CASES ON
QUASI CONTRACTS

C.B. Whittier

C. B. Whittier

SELECTED CASES

ON THE

LAW OF QUASI-CONTRACTS

By

EDWIN H. WOODRUFF
DEAN OF THE COLLEGE OF LAW
CORNELL UNIVERSITY

SECOND EDITION

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

PREFACE TO THE SECOND EDITION

This volume is intended to contain a representative selection of cases upon the large and important group of legal duties embraced in the term quasi-contract, and to afford material for the study and discussion of the principles regulating recovery in that class of cases, as those principles are found implicated with, and working upon, the actual facts of decided cases. For the historical development of the law of quasi-contracts, the student is referred to the masterly *History of Assumpsit,* by the late Dean Ames, which, by his permission, was printed as an appendix to the first edition of this book, but is omitted in the present edition because it is now accessible not only in Vol. 2 of the *Harvard Law Review,* where originally published in 1888, but also in Vol. 25 of the Fifth Series of the *Law Magazine and Review* (1900); in Vol. 3 of *Select Essays in Anglo-American Legal History* (1909); and in Ames's *Lectures on Legal History* (1913).

The primary division of the work into three parts was determined by the broad classification first given by Professor Ames in his *History of Assumpsit,* and adopted by Professor Keener in the introductory chapter to his *Treatise on Quasi-Contracts.* However, by far the greater part of the subject is comprised in Part III, under the general doctrine of "Unjust Enrichment," and the arrangement employed by the present editor for this part, while not the only feasible grouping, will, it is hoped, be practically satisfactory. As Dr. Johnson says in his essay on Pope: "Of two or more positions depending upon some remote or general principle, there is seldom any cogent reason why one should precede the other"; and so, while the cases in Part III depend upon the very general principle of "Unjust Enrichment," and while a cogent reason can not always be given why some of these positions should precede others, nevertheless the special correlation of analogous topics has been the guide to the present arrangement. But any classification of the law of quasi-contracts still leaves large liberty of choice in determining the order in which the topics may be taken up for study and discussion.

The notes appended to the case are in many instances apposite quotations from judicial decisions which themselves might well have been selected for publication in full, had not the limitations of space forbidden.

The principal changes made in the present edition are (1) the omission of twenty-five cases that were in the first edition, and the insertion of fourteen new cases; (2) a considerable increase in the scope and number of annotations; (3) amplification of the treatment of defendant's default by breach of contract, and especially the question of restitution by plaintiff; (4) the re-grouping of some of the cases on mistake of fact; (5) the omission of Dean Ames's *History of Assumpsit*, as noted above.

COLLEGE OF LAW, CORNELL UNIVERSITY,
May 1917.

TABLE OF CONTENTS.

PART I.

RECOVERY UPON A RECORD.

PART II.

RECOVERY UPON A STATUTORY, OR OFFICIAL, OR CUSTOMARY DUTY.

PART III.

RECOVERY UPON THE DOCTRINE THAT ONE PERSON SHALL NOT BE ALLOWED TO ENRICH HIMSELF UNJUSTLY AT THE EXPENSE OF ANOTHER.

TABLE OF CASES

*** Where *n* is prefixed to the page number, the case is referred to, by the present editor, in a note.

A SELECTION OF CASES ON THE

LAW OF QUASI-CONTRACTS

PART I.

RECOVERY UPON A RECORD.

A. RECOVERY UPON A JUDGMENT.

ANDREWS v. MONTGOMERY AND OTHERS.

19 JOHNS. 162.—1821.

ASSUMPSIT, on a judgment recovered against the defendants, in the Court of Common Pleas of the County of Essex, in the state of New Jersey. The defendant's counsel insisted that the action should have been debt, not assumpsit.

SPENCER, CH. J.—* * * * The plaintiff has counted upon the judgment in New Jersey, as a simple contract; and, accordingly, it is set forth as a promise to pay the amount adjudicated. Now it is well settled, that assumpsit cannot be supported, where there has been an express contract under seal, or of record but the party must proceed in debt or covenant, where the contract is under seal, or in debt, if it be of record, even though the debtor, after such contract were made, expressly promised to perform it. (1 Chitty, 94, and the numerous cases there referred to.) In Pease v. Howard, 14 Johns. Rep. 479, this court decided that a judgment in a justice's court was not within the statute of limitations, like a foreign judgment, and that it was in the nature of a specialty. The judgment recovered in New Jersey being admitted by the pleadings, and standing totally unimpeached, we are bound to consider it as fairly and justly obtained, and as establishing a debt of record against the defendant. It is not, therefore, merely prima facie evi-

dence of a debt, like a foreign judgment, but absolute and decisive evidence of a debt. Assumpsit then will not lie upon it; and without examining the pleas, as it is impossible to support the plaintiff's action, be they ever so bad, the defendant must have judgment.

Judgment for the defendant.

FIRST NATIONAL BANK OF NASHUA v. VAN VOORIS.

6 South Dakota 548.—1895.

Attachment by the First National Bank of Nashua, Iowa, against William F. Van Vooris. From an order dissolving the attachment, plaintiff appeals. Reversed.

Kellam, J.—This is an appeal from an order of the Circuit Court of Brookings County discharging an attachment. The leading question in the case is whether, within the meaning of our attachment law, a judgment of a sister state is a contract, without regard to the character of the original cause of action which entered into it. The difficulty is not to find direct adjudications upon the general question of whether a judgment is or ought to be classed as a contract, for they are almost numberless on both sides of the question. The embarrassment is to determine which line of these cases, so squarely opposed to each other, is most securely grounded upon good reason, and most likely to result in its practical application in the most good and the least harm. Although some elementary law writers, and some courts whose learning is so great and whose judgment is so nearly infallible as to almost foreclose further inquiry, have declared judgments to be contracts, and have so classed them, it is very obvious that ordinarily they lack the element of consent, which is generally named as the very life and spirit of a contract. It would look pedantic, and probably serve no useful purpose, to undertake in this opinion to rewrite the learning found in the opinions of other courts, and in the books of the text writers, upon this question of the contract character of a judgment. A very brief examination of the subject demonstrates the fact that the most learned, careful, and thoughtful judges and lawyers have reached directly opposite conclusions. In Black on Judgments (Vol. I, § 7 *et seq.*) are marshaled a large number of these conflicting decisions. In Louisiana v. Mayor, etc., of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, the judges of the Federal Supreme Court could not agree that a judgment was or was not a contract.

It seems to me, however, that, even if a judgment is not a contract in a broad and unqualified sense, it does not necessarily follow that a foreign judgment cannot be the basis of an attachment. This must depend upon the interpretation to be given to the expression, "action arising on contract," as used in the attachment law. The original office of the attachment was to secure the collection of debts. The

relation of debtor and creditor must exist. It could not be used in actions for wrongs or torts. In some of the states this scope of the proceeding has been enlarged so as to include in some states specified, and in others all, actions in tort. Actions at law are fundamentally and logically divided into two classes,—"actions ex contractu" and "actions ex delicto,"—though these express terms are not employed in the statute. Everybody knows what these terms mean, and, while the legislature seemed to prefer English words, we are inclined to think that they used this expression, "actions arising on contract," as the equivalent of "actions ex contractu," just as they substituted "claim and delivery" for "replevin." Now, while it may seem essentially contradictory to say that an action brought on something which is not a contract is an action ex contractu, or an "action arising on contract," still what we seek is to know what kind of an action the legislature meant when they referred in their attachment law to an "action arising on contract." It seems to us that the thought and purpose of this first paragraph of the attachment law was to declare in what general class of actions an attachment would lie. It was a declaration of the purpose and policy of the attachment law of this state as to what general class or kind of actions might be aided by attachment. By the statutes of some of the states, attachments were allowed in any action for the recovery of money. Sometimes both classes were expressly named, as in Georgia, where it was available "in all cases of money demands, whether arising ex contractu or ex delicto." In others the remedy was confined to actions "on contract, express or implied"; "actions on contract"; "actions arising on contracts," etc.,—all meaning, as we think, that general class of actions known in legal nomenclature as "actions ex contractu." Subsequent provisions are supplementary, and define particularly the further conditions that must exist to justify the issue of the attachment. The general condition announced in the beginning is that the action must be of that class known as "actions on contracts," as distinguished from "actions for torts." Actions on judgments form a very common class of actions, and have always been brought as ex contractu actions, and not as tort or ex delicto actions. O'Brien v. Young, 95 N. Y. 431; Louisiana v. Mayor, etc., of New Orleans, supra; Johnson v. Butler, 2 Iowa 535. This is not because judgments are essentially and absolutely contracts, but because the obligation imposed by them is more in the nature of a contract liability than a tort liability. It seems much the same in character as the liability of an infant to pay for necessaries. The judgment against him does not rest upon his contract liability, for he is not required to pay what he promised or agreed to pay, but simply what it is right for him to pay, and yet his liability is regarded and classed as contractual.

We are inclined to regard a judgment, not as a contract, but as a quasi-contract, which the legislature and the courts have treated as a contract in respect to the remedy by subsequent action upon it; and so, as before suggested, the question whether, under our

statute, an attachment may issue in an action on a judgment depends upon the sense in which the legislature used the expression, "action arising on contract." If used in an exact and literal sense, an action on a judgment would not, in our opinion, be included; but if used in a general and leading sense, to distinguish actions of one class from those of the other, then the expression must be presumed to have been used in view of the common understanding and practice that actions on judgments were actions on contract. I think the same meaning was intended here, as by the same words in section 4915, providing that a cause of action "arising on contract" may be pleaded as a counterclaim. I think there could be little doubt that an existing judgment might, under this provision, be pleaded as a counterclaim. This point was directly ruled in Taylor v. Root, *43 N. Y. 335, where it was held that, in an action on contract, a judgment in an action of slander could be set up as a counterclaim for the reason that, within the meaning of that provision, it was a cause of action arising on contract. In Wyman v. Mitchell, 1 Cow. 316, and McCoun v. Railroad Co., 50 N. Y. 176, and O'Brien v. Young, 95 N. Y. 428, all New York cases, it was distinctly said that a judgment was not a contract; and yet in Nazro v. Oil Co., 36 Hun 296, and again in Gutta-Percha & Rubber Manuf'g Co. v. Mayor, etc., 108 N. Y. 276, 15 N. E. 402, reversing 46 Hun 237, it was held that an action on a judgment was one on "a contract express or implied," within the meaning of the attachment law, and the right to attachment was in each case sustained. In the latter case the court said: "In a suit upon a binding judgment, whether foreign or domestic, the plaintiff must therefore be entitled to the same provisional remedies to which he would be entitled in an action upon a contract express or implied." Upon the same line the supreme court of North Carolina said that, while judgments were not treated as contracts for all purposes, they were so treated for the purpose of distinguishing them from causes of action ex delicto, and that they were not included in a statute covering causes of action "not arising out of contract." See Moore v. Nowell, 94 N. C. 265. In Johnson v. Butler, 2 Iowa 535, an attachment was issued on an action on a judgment. Their attachment law prescribes a different procedure in an action "founded on contract" from that in an action "not founded on contract." The question was as to which class the action belonged. The court said: "The distinction is manifestly between actions ex contractu and ex delicto, and it was always so understood and so acted upon. * * * The Code does not recognize the common-law technical names of action, nor, in this case, even the general classification of those upon contract and those of tort, in express and technical terms; still the sense cannot be mistaken." The Wisconsin supreme court in Childs v. Manufacturing Co., (Wis.) 32 N. W. 43, discussed the question whether an action on a judgment, as one arising on "contract expressed or implied," could be joined with an action for the breach of an express contract, and said: "When we consider the object of section 2647, we think

it very clear that the legislature intended to use the word 'contract' in said subdivision in its largest sense, and not in a restricted sense. The object of the section, as a whole, is to classify causes of action with reference to their joinder in one and the same action. * * * In this view of the subject, notwithstanding the fact that in other parts of the statute, and for other purposes, the legislature seems to have made a distinction between 'contracts' and 'judgments,' that fact furnishes no good reason for holding that in said section 2647 the word 'contract' was not intended to be used in its larger meaning, so as to cover a case of a judgment for the payment of money."

Against this enlarged interpretation of the expression, "actions arising on contract," so as to include an action on a judgment, it is urged that the legislature of at least one of the states, Nebraska, did not so use or understand it, for they thought it necessary to expressly add "judgment or decree" to "debt or demand arising upon contract." There is certainly some force in this, but the argument is of the same character as it would be to urge that under our law an attachment would lie in an action for a breach of promise to marry, because in New York it was thought necessary to except such actions from those on "contract, expressed or implied;" and our legislature has not made such exception, thus indicating, as the argument would be, that they intended to allow attachments in such cases. We do not think the fact in either case, or the inference therefrom, is potent enough to control our conclusion as to the proper interpretation of our law. While the question is not entirely free from embarrassment, we conclude that an action on a judgment is an "action arising on contract," within the meaning of that expression as used in our attachment law, and that this is so whether the original cause of action which entered into the judgment was one on contract or tort. This view necessitates the conclusion that the court erred in discharging the attachment, on the ground that the action was not one arising on contract, and the order appealed from is reversed. All the judges concur.[1]

[1] MEANING OF "CONTRACT" AS USED IN STATUTES.—A judgment is not a contract within the meaning of the constitutional provision against legislation impairing the obligation of contracts, Louisiana v. New Orleans, 109 U. S. 285 (1883). The following New York cases serve to illustrate, by judicial determination, whether the word "Contract" as used in various statutes means true contract only, or includes quasi-contract as well: "Express or implied contract" in § 420, Code Civ. Pro. (taking judgment without application to the court),—a statutory liability to refund is an implied contract, Augner v. Mayor, 14 App. D. 461 (1897). "Cause of action on contract" in § 501, subd. 2, of Code Civ. Pro. (counterclaim by such cause of action),—a judgment in a tort action is an implied contract, Taylor v. Root, 4 Keyes 335 (1868). "Contract express or implied" in § 635, subd. 1, of Code Civ. Pro. (granting warrant of attachment),—a judgment is an implied contract, Gutta Percha Co. v. Mayor, 108 N. Y. 276 (1888), but a statutory liability to pay costs is not, Remington Paper Co. v. O'Dougherty, 96 N. Y. 666 (1884), affirming, without opinion, 32 Hun 255. Exception of "any contract or obligation made before the passage of the act" in ch. 538, Laws of 1879 (reducing legal rate of interest),—a judgment is not a contract, O'Brien v. Young, 95 N. Y. 428 (1884). "Judgment or

LOEHR v. DICKSON.

141 WIS. 332.—1910.

Appeal from order sustaining a general demurrer to plaintiff's complaint, which alleged that defendant is the owner of certain real estate in Waukesha county; that on February 23, 1906, a judgment was entered of strict foreclosure of a land contract which had previously been given by defendant to plaintiff; that such strict foreclosure was subject to the condition that plaintiff pay to defendant on or before August 23, 1906, certain sums of money aggregating on that date approximately $60,000; that plaintiff prior to August 23d, to wit, in the latter part of the month of July, made various attempts to pay said money to the defendant, repeatedly going to his house with the money and sending him letters which he is alleged to have received, notifying him of the wish to make payment, and that on August 23d a messenger or agent of the plaintiff found defendant and notified him of plaintiff's desire and readiness to make such payment, whereupon defendant appointed an hour on the following day at his attorney's office at which he would be present and would receive the money; that plaintiff attended at that time with the money, and defendant did not appear; and that he has been unable to physically tender the payment to him. The plaintiff alleges that the acts of defendant in evading such tender were willful and with the intention of preventing plaintiff from saving his rights under the land contract, and to impose upon him the forfeiture of such rights; further, that on February 24th plaintiff, in reliance upon said judgment, had granted to one Smith an option for the sale of the property involved for $70,000 on or before August 21, 1906, wherein time was of the essence of the contract, and failure by plaintiff to make conveyance on or before August 21st released said Smith; that on said August 21st plaintiff sold and by warranty deed conveyed said property to said Smith in pursuance of said option for $70,000, subject to the condition that, if plaintiff failed to secure proper releases and conveyances from the defendant or his assigns by August 30th, said deed should be void and plaintiff must repay said $70,000; that, by reason of defendant's willful evasion of plaintiff's tender, the latter was unable to comply and was obliged to refund, and to lose the profit of said sale, together with certain other opportunities for sale, whereby he suffered damage in the sum of $12,068.76, and certain other amounts, for which plaintiff demands judgment.

decree founded upon contract" in ch. 300, § 1 of Laws of 1831 (arrest in civil actions),—a judgment founded upon a quasi-contractual liability is not a judgment founded upon contract. People ex rel. Dusenbury v. Speir, 77 N. Y. 144 (1879). And see also, Willard v. Doran & Wright Co., 48 Hun 402 (1888), where § 1013 of the Code Civ. Pro. (providing for compulsory reference) is held applicable to actions on true contract only.

Dodge, J.—Plaintiff assures us in advance that his attempt is to state a cause of action in tort. Examining the complaint in that aspect then: It is at once obvious that none of the acts alleged against defendant is in and of itself prohibited by any law. At most, it is alleged that he did not stay at his home through several days during which plaintiff desired to make tender, or inferentially that he went somewhere else; also, that he refrained from going to his attorney's office on a certain day promised. Obviously all such acts were entirely lawful in and of themselves. No law prohibited him from leaving home nor commanded his attendance at his attorney's office. If he owed any duty in those respects, it was one imposed by his own promise or contract, and not by law. The fact that inconvenience or actual pecuniary injury results to another from such lawful acts does not transform them into torts. It is but a case of damage without legal wrong—"Damnum absque injuria." Whalon v. Blackburn, 14 Wis. 432. But the complaint alleges that these acts, lawful in themselves, were done maliciously—that is, with the express purpose of causing plaintiff damage—and therefore liability results. Very little aid is given by either counsel on this essential question whether a lawful act becomes a tort by reason of malice or intent to injure.

Upon this question there is a sharp conflict of authority throughout the courts of the country. The principle is asserted by perhaps the majority of those authorities "that malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful." 32 Ohio Law Journal, 215; Jenkins v. Fowler, 24 Pa. 308. A copious collection of authorities on both sides will be found in the note to Letts v. Kessler, 40 L. R. A. 177. However, that subject was presented to this court in Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841, under the aspect of a "spite fence" impairing plaintiff's enjoyment of his residence property. The conflicting authorities were carefully considered, and from that conflict this court allied itself with those holding that mere malice or motive to injure could not impose liability for a lawful act. That case has been treated as final authority for that proposition in Sullivan v. Collins, 107 Wis. 291, 83 N. W. 310; Marshfield Land & Lumber Co. v. John Week Lumber Co., 108 Wis. 268, 274, 84 N. W. 434; Huber v. Merkel, 117 Wis. 355, 363, 94 N. W. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933. We deem the rule of Metzger v. Hochrein now settled in Wisconsin and that malicious intent to injure cannot transpose a lawful act into a tort, and hence that the complaint fails to state a cause of action ex delicto.

The conclusion reached in response to plaintiff's own construction of his complaint is, however, not conclusive. A demurrer challenges the sufficiency of the complaint to state any cause of action, and must not be sustained in face of one which does by liberal construction state facts from which any liability results, although not for some

or all of the damages sought to be recovered. Bieri v. Fonger, 139 Wis. 150, 120 N. W. 862. From the present complaint it clearly appears that defendant was under a contractual duty to the plaintiff none the less because such duty had been declared and defined by the judgment of a court. That contract required defendant to convey to the plaintiff certain land upon payment of certain money within a defined time. It imposed upon the plaintiff a duty to the defendant to make such payment or at least tender to him personally, for the conveyance was to be cotemporaneous, and such cotemporaneousness was doubtless necessary to the raising of the money to be paid. From a contract imposing such duty on the plaintiff there resulted by necessary implication the agreement on defendant's part to do no act which would render such payment or tender impossible. This upon the general principle that he who by mutual contract confers on another a right or imposes a duty impliedly agrees not to defeat that right or make impossible the performance of that duty by any affirmative acts of his own. Manning v. Galland-Hennings, etc., Co. 141 Wis. 199, 124 N. W. 291; Eliot National Bank v. Beal, 141 Mass. 569, 6 N. E. 742. By this complaint it is alleged that the acts of defendant were in fact done for the express purpose of preventing the plaintiff from tendering or paying the money and acquiring his rights; that they were effective to that end; and that damages of various sorts resulted to him. These facts of themselves are sufficient to show a breach of contract and resulting damages, unless, indeed, it appears by other allegations of the complaint either that damages did not necessarily result from defendant's breach of his contract duty, or that they were not such as were within reasonable contemplation of the parties at the time of making the contract. Hadley v. Baxendale, 9 Exch. 341; Guetzkow v. Andrews, 92 Wis. 219, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909; Lippert v. Saginaw Milling Co., 108 Wis. 512, 84 N. W. 831.

* * * * * * *

TIMLIN, J. (dissenting).—* * * * The pleader intended to state a cause of action in tort, and he has stoutly contended before this court that the complaint states such cause of action. But the majority of this court holds that the complaint shows a contract obligation resting upon Dickson and a breach thereof by the latter. I concur in the view that the complaint states no cause of action in tort, for it shows no breach by Dickson of any duty imposed upon him by law. I think the original contract stipulations which were the subject of the foreclosure suit are merged in the decree there given. No doubt a judgment is for certain purposes considered a contract. But this is a legal fiction referable to certain remedies thereon or necessary to meet the requirements of statutes or constitutions which might otherwise include the contract until judgment was entered thereon and fail to cover it thereafter. Bishop on Contracts, §§ 141, 566; 1 Black on Judgments, §§ 7-11; 17 A. & E. Ency. of Law (2d ed.) pp. 763, 764, and cases cited.

If this decree creates, expressly or by implication, a contract obligation of the kind suggested resting upon Dickson, then every decree for specific performance or similar relief creates such contract obligation, and may be the basis of an action at law. On the other hand, if we consider the original contract stipulations to be in force notwithstanding the decree, or if we consider that the decree continues the stipulations in force unmodified, there is no covenant, express or implied, in the original contract that Dickson shall be at any particular place or hold himself in readiness to receive this money. It is the duty of the debtor where no place of payment is fixed to seek out, find, and pay to his creditor. If a mortgagee leaves the state or changes his place of residence, and his whereabouts are unknown to the mortgagor for 10 or 15 years, is he liable at law upon contract for damages if a wrongful or malicious intent be found? In the case at bar I think the only effect of this absence of Dickson, whatever his motive, would be to entitle the defendant in the strict foreclosure judgment upon application to the court to have the time of payment extended or to pay the money into court. The weakness of the decision I think is that it finds a contract obligation resting upon the defendant where none exists, either expressly or by implication, and finds a breach thereof consisting of lawful and usual acts not by any obligation prohibited.

KERWIN, J., concurs.

B. RECOVERY UPON A RECOGNIZANCE.

GREEN & GREEN v. OVINGTON & BLEECKER.

16 JOHNS. 55.—1819.

SPENCER, J.—* * * * The plaintiff declares in debt, on a record of recognizance of bail entered into by the defendants, in the Mayor's court, as of April term of that court, in 1810; and refers, in his declaration, to the record of recognizance remaining in that court, in the usual form of declaring on records of judgment or recognizance, *prout patet per recordum.*

The defendant's plea impeaches the record, in stating that the bail-piece, which is the warrant for the recognizance record, was not acknowledged by the defendants until after the judgment in the original cause, to wit, the 24th of January, 1811; and the plea concludes with the allegation, that the bail-piece is void. As the plea is clearly bad, it is unnecessary to take any particular notice of the replication. Although the recognizance of bail is taken before a single judge of a court, it is, in legal contemplation, done in court; and it is so entered. The bail-piece is a mere memorandum of the recognizance, authorizing the making up the record of recognizance

of bail, and when that is filed it becomes a record of the court and the party in whose favor it is acknowledged, may, on its being forfeited, bring either a *scire facias*, or debt, at his election. The validity of records, among which are recognizances of bail, cannot, in pleading, be impeached or affected by any supposed defect or illegality in the transaction on which they were founded; nor can there be any allegation against the validity of a record. (1 Chitty Pl. 354, and the cases there cited.) It is to be observed that all the pleas by bail, of which we have any precedent, state matters consistent with the record. If the record is untruly stated, the defendants can avail themselves of such defect, only by pleading *nul tiel record*. Judgment for the plaintiff.[1]

[1] In State v. McGuire, 42 Minn. 27 (1889), the court says: "A recognizance differs from a bond in this: that while the latter, which is attested by the signature and seal of the obligor, creates a fresh or new obligation, the former is an acknowledgment on record of an already existing debt, with condition to be void on performance of the thing stipulated, and attested by the record of the court alone, and not by the obligor's signature and seal. It is undoubtedly essential that it be a matter of record, and that it contain and express in the body of it the material parts of the obligation and condition; and, if deficient in this respect, the record cannot be aided by parol. In an action of debt on a recognizance at common law, the utmost strictness that was ever required was that the declaration should state it with certainty, pursuing the description in the entry of recognizance, and should allege in what court, and at whose suit, and for what sum the defendants acknowledged themselves obligated; also, that it should be averred that it is a record, and the breach stated according to the terms of the recognizance. We cannot see wherein the complaint in this action fails to comply with a single one of these requirements."

In Bodine v. Commonwealth, 24 Pa. St. 69 (1854), the court says: "The 2d section of the Act of 2d December, 1783, and the 2d section of the Act of 30th March, 1821 (Brightly's Purdon 375), confer jurisdiction upon the common pleas over forfeited recognizances, but do not prescribe the form of action to be brought. Debt has generally been the action adopted, but in some parts of the state we are told the *scire facias* has uniformly been employed. We are of opinion that either action will lie. Of the two actions perhaps the *scire facias* is most appropriate, for the recognizance is matter of record, is in the nature of a judgment, and the process upon it is for the purpose of carrying it into execution, and is rather judicial than original. It is no further to be reckoned an original suit than that the defendant has a right to plead to it. It is founded upon the recognizance, and, partaking of its nature, must be considered as flowing from it; and when final judgment shall be given the whole is to be taken as one record: Cobbet's Case, 2 Yeates 362. Chitty, in his excellent work on Pleading, Vol. I, p. 100, citing Tidd's Practice, expresses preference for the *scire facias* in these words: "Debt is sometimes brought upon a recognizance of bail, but the remedy thereon is more frequently by *scire facias*, because in the latter the proceeding is more expeditious, and the bail have less opportunity of discharging themselves by rendering their principal."

In Smith v. Collins, 42 Kan. 259 (1889), the court says (p. 260): "Strictly speaking, a recognizance is a debt confessed to the state which may be avoided upon the conditions stated. At common law the forfeiture of the recognizance was equivalent to a judgment. * * * Another theory of the common law was that the cognizors by an acknowledgment of the cognizance had already submitted themselves to the jurisdiction of the court;" and from these theories grew a rule that "recognizances must be prosecuted in the court in which they were taken or acknowledged, or to which they were returned."

See also, as to recovery upon a record, Cockram v. Welby, 2 Show. 79, set out herein at p. 16, note; and as to the history, nature and effect of a recognizance, People v. Kane, 4 Denio (N. Y.) 530 (1847).

PART II.

RECOVERY UPON A STATUTORY, OR OFFICIAL, OR CUSTOMARY DUTY.

A. STATUTORY DUTY.

STORY, J., IN BULLARD v. BELL.

1 MASON 243, 298.—1817.

THIS is a liability created, not merely by the act of the parties, but by the express terms of a statute. The act of incorporation provides "that if said corporation shall, at any time hereafter, divide their stock, previous to the payment of all their bills, or shall refuse or neglect to pay any of their bills when presented for payment in the usual manner, the original stockholders, their successors and assigns, and the members of such corporation shall, in their private capacities, be jointly and severally liable to the holder of any bill or bills issued by the said corporation for the payment thereof," etc., etc. I agree at once to the position, that the bills of the bank are to be considered originally as the debts of the corporation and not of the corporators; and, except from some special provision by statute, the latter cannot be made answerable for the acts or debts of the former. They are altogether in law distinct persons and capable of contracting with each other. But the corporators are not strangers to the corporation. On the contrary, the law contemplates a privity between them, and upon that privity has created an obligation on the corporators, under certain circumstances, to pay the debt of the corporation. Nothing can be better settled than that an action of debt lies for a duty, created by the common law, or by custom. *A fortiori* it must lie, where the duty is created by statute. Mr. Justice Blackstone says, "that every person is bound, and hath virtually agreed to pay such particular sums of money, as are charged on him by the sentence, or assessed by the interpretation of the law. Whatever, therefore, the law orders any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." Without placing any reliance upon this refined notion of contracts, it cannot be doubted that the learned judge has expressed the true doctrine of the law. Whatever is enjoined by a statute to be done, creates a duty on the party, which he is bound to perform. The

whole theory and practice of political and civil obligations rest upon this principle. When therefore a statute declares, that, under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate obligation to pay it. The consideration may be collateral or not, but it is not a subject-matter of inquiry, and to deny that it is a duty on the stockholder to pay the money, is to deny the authority of the statute itself, for a duty is nothing more than a civil obligation to perform that which the law enjoins. Here then the law has declared that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty so to do. How then can the court say that debt does not lie, since there is a duty on the defendant to pay the plaintiff a determinate sum of money? There is no room, under this view of the case, for entertaining any question as to collateral undertakings. The law has created a direct liability, a liability as direct and cogent, as though the party had bound himself under seal to pay the amount in which case debt would undoubtedly lie. The law esteems this an obligation created by the highest kind of specialty. Indeed, if debt would not lie in this case, it is inconceivable how assumpsit could. There is no pretense of any express promise, and if a promise is to be implied, it must be because there exists a legal liability, independent of any promise sufficient to sustain one. Now the very notion of a collateral undertaking is, that there exists no legal liability, independent of the promise to create a duty. And if there exists a duty sufficient to raise a promise, then it is sufficient to sustain an action of debt. Upon the most mature reflection I am of opinion that an action of debt well lies in this case.[1]

[1] In Elliott v. Gibson, 10 B. Mon. (Ky.) 438 (1850), where assumpsit was brought upon the liability of the owner of an escaped slave to pay a statutory reward, if he received the slave back, the court said (p. 439): "A statute is in some respects considered a specialty, and debt is frequently, perhaps generally, the remedy prescribed for the recovery of any money due to the plaintiff under its provisions under contract or quasi-contract; but when the statute does not prescribe the remedy, assumpsit may be supported, the plaintiff not being by it restricted to any particular remedy: (1 Chitty's Pleadings, 120; Buller, N. P., 129)." See also, (assumpsit) Central Bridge Trans. Co. v. Abbott, 4 Cush. (Mass.) 473 (1849), and Augner v. Mayor, 14 App. D. (N. Y.) 461 (1897), where it is said (p. 466), speaking of the action under the reformed procedure: "This action is upon what has been aptly termed a quasi-contract. It is not upon a genuine contract, that is, an agreement, in fact, between plaintiff and defendant, either express or implied. It is simply upon a statutory liability, which is sufficient to sustain an action analogous to what was formerly called assumpsit."

In Steamship Co. v. Joliffe, 2 Wall. (U. S.) 450 (1864), plaintiff brought an action to recover under a statute which allowed half-pilotage fees to a pilot whose services were tendered and declined. The statute was later repealed. The court said (p. 457): "The claim of the plaintiff below for half-pilotage fees resting upon a transaction regarded by the law as a quasi-contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and

HARRIS v. CHRISTIAN.

10 PA. ST. 233.—1849.

ASSUMPSIT for work and labor done. Pleas, non-assumpsit and the statute of limitations. The claim was for fees earned by the plaintiff's intestate, who was as alderman a magistrate of Philadelphia. In many instances the suits were ended more than six years before this action was brought. His honor instructed the jury that the plaintiff could recover in all cases where there had been a judgment recovered. 2. That the statute was not a bar, as the claim was for a debt of record.

ROGERS, J.—We see nothing wrong in the trial except the answer of the court to the defendant's fifth point. The court was requested to instruct the jury that the statute of limitations is a bar in all cases in which the services were rendered more than six years before the death of the alderman. The court refused to give this instruction, under the erroneous idea that the action was founded on a claim of record, and not a contract. Although the docket of the justice is evidence to charge the defendant with the costs of the original writ, subpoena, and execution, yet it is not a debt of record, but the evidence of a debt, from which the law will imply a promise to pay. And such was the opinion of the court in Lyon v. McManus, 4 Bin. 167. The action to recover the fees in that case was assumpsit on an implied contract, and it was there held that where a statute gives fees the law implies a promise to pay by the person to whom the service is rendered. The plea of the statute of limitations is therefore a good plea. The suit is brought against the plaintiff [defendant] to recover for services rendered him in the suits before the alderman. He must look to the defendant for indemnity. It may be proper to add that the suits are terminated within the meaning of Lyon v. McManus, on the rendition of the several judgments. We are further of opinion that the costs may be recovered on a declaration for work and labor done, and goods sold and delivered. No injury can result to the defendant from the generality of the counts, as he may have a bill of particulars on demand.

Judgment reversed and a *venire de novo* awarded.

has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

INHABITANTS OF MILFORD v. COMMONWEALTH.

144 Mass. 64—1887.

Field, J.—The question of law to be decided is whether the claim that the commonwealth reimburse to the town the expenses incurred in the support of a state pauper, under the Pub. Stats., c. 86, §§ 25, 26, is a claim which is founded upon a contract for the payment of money, within the meaning of the statute of 1879, c. 255 (Pub. Stats., c. 195). See Stats. 1865, c. 162; 1869, c. 12; 1879, c. 291, § 3.

The Court of Claims of the United States, under statutes which give it jurisdiction to hear and determine "all claims founded upon any law of congress, . . . or upon any contract, expressed or implied, with the government of the United States," etc., has heard and determined claims for salaries or pay established by a law of the United States, and these have been sometimes spoken of as claims founded on contract, although it is not clear that they ought not to be regarded as claims founded upon a law of the United States. U. S. Rev. Stats., § 1059. Patton v. United States, 7 Ct. of Cl. 362, 371; French v. United States, 16 Ct. of Cl. 419; Collins v. United States, 15 Ct. of Cl. 22; Mitchell v. United States, 18 Ct. of Cl. 281, s. c. 109 U. S. 146; United States v. Langston, 118 U. S. 389.

In matters of procedure, penalties have usually been regarded as debts. In the Pub. Stats., c. 167, § 1, actions for penalties are excluded from actions of contract, and are included in actions of tort, but actions under statutes to recover for money expended have usually been actions of contract. New Salem v. Wendell, 2 Pick. 341; Oakham v. Sutton, 13 Met. 192; Amherst v. Shelburne, 11 Gray 107; Wenham v. Essex, 103 Mass. 117.

The law regards the money as expended at the implied request of the defendant, and a promise to pay the money is said to be implied from the liability created by the statute. A contract may be expressly made, or a contract may be inferred or implied when it is found that there is an agreement of the parties and an intention to create a contract, although that intention has not been expressed in terms of contract; in either case, there is an actual contract. But a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case, there is not a contract, and the obligation arises *ex lege*.

We are of opinion that the Stat. of 1879, c. 255, was not intended to give to the superior court jurisdiction over obligations for the payment of money imposed by statute upon the commonwealth. There are many such obligations, but they are not within any of the definitions of a contract, all of which require a consent or agreement of the parties. These statutory obligations are per-

formed by the various officers of the commonwealth, or by the legislature. In one case, at least, there is a remedy by a petition in the nature of a petition of right, to be filed in the supreme judicial court. Pub. Stats., c. 13, § 64. In most cases, however, no judicial remedy against the commonwealth has been provided, and the commonwealth cannot be sued in its own courts without clear statutory authority.

We think that the Pub. Stats., c. 195, must be confined to actual contracts made by the commonwealth for the payment of money, and we are not now required to determine whether they must be express contracts.

Exceptions overruled.

B. Official Duty.

BODENHAMER v. BODENHAMER.

6 Humph. (Tenn.) 264.—1845.

Reese, J.—The defendant sued the plaintiff in error by warrant or summons before a justice of the peace, "in a plea," as the summons says, "of debt under one hundred dollars." The justice gave judgment for the plaintiff below, for the sum of forty-five dollars. The defendant appealed to the circuit court, where a verdict was rendered against him for about the same amount.

The defendant below was an officer, and had in his hands an execution in favor of the plaintiff, which he levied upon property of the execution debtor, sufficient to satisfy the execution. It did not appear whether he had collected the money or not. It seems that the chief controversy in the circuit court, as here, related to the form of action, and to whether debt would lie. The court charged the jury that the officer could not be held liable on the ground of negligence or malfeasance in that form of action; but that if he had collected the money, or levied the execution upon property sufficient to satisfy the execution, as that would discharge the execution debtor, the defendant would become liable for the amount of the execution, and the action of debt might be maintained to enforce such legal liability.

We are of opinion that this part of the charge is correct, namely: that the collection of the money or a levy upon personal property sufficient to satisfy the execution, will maintain the action of debt against the officer; but we are further of opinion that as this case presented itself at the trial in the circuit court and was for an amount below fifty dollars, and within the jurisdiction of the magistrate, if there had been doubt whether the action of debt would lie, it was not necessary to hold that that was the form of action from anything said in the warrant or summons. The several forms of

action and the rules which govern them cannot be enforced and preserved in suits before justices. So that we have held at this term and heretofore that in such cases the statutes of limitation will be applied to the evidence and substance of the case, and not to any words indicating a form of action which the magistrate may choose to use in his summons or warrant. These words "of plea of debt" must be moulded to apply to accounts, assumpsit, to damages for non-compliance with a contract, or legal duty, etc. If held to the true meaning of technical words used by them these domestic tribunals would involve the affairs of society in more than the confusion and difficulty necessarily incident to the administration of the laws by persons being so imperfectly acquainted with them.

Let the judgment be affirmed.[1]

[1] In Speake v. Richards, Hob. 206 (1618), the sheriff had made the levy and return, but did not pay the money; and "the first question in this case was whether the action of debt would lie, because there was no contract between the plaintiff and the sheriff. But that was resolved by the court that it would lie; for though there were no actual contract yet there was a kind of contract in law, so it is *ex quasi contractu*. And therefore upon damages recovered in an action of trespass, the plaintiff shall have an action of debt; and by the same reason when the money is levied by the sheriff, so as the action ceased against the defendant, the same action is *ipso facto* by law transferred to the sheriff, having both the judgment to make it a debt, as before, and the levy to make him answerable."

Further as to recovery upon an official duty, and the appropriate action, see the following: Debt allowed against a sheriff,—Perkinson v. Gilford, Cro. Car. 539 (1640); Ruggles v. Beikie, 3 O. S. Upper Can. K. B. 276 (1833); Neal v. Haygood, 1 Ga. 514 (1846). Indebitatus assumpsit allowed against a sheriff, —Overton v. Hudson, 2 Wash. (Va.) 172 (1796). Assumpsit not allowable against an officer, McMillan v. Eastman, 4 Mass. 378 (1808); Bailey v. Butterfield, 14 Me. 112 (1836); not allowable unless plaintiff has an instant right to moneys in the hands of the officer, Maddox v. Kennedy, 2 Rich. L. (S. C.) 102 (1845). Previous demand upon the sheriff held not necessary, Nelson v. Kerr, 59 N. Y. 224 (1874).

That recovery in such case is founded upon a record is held in Cockram v. Welby, 2 Show. 79 (1679), reported as follows: "Debt against the defendant, having been sheriff of the county of [Lincoln] and levied money on a *fieri facias* sued by the plaintiff on a judgment he had obtained against J. S. The defendant pleads the statute of limitations. The plaintiff demurs. The question was, if debt lies against a sheriff for money levied on a *fieri facias* before the return of the writ. AND HELD that it does, else an inconvenience would follow that the sheriff should take advantage of his own wrong, viz.: not returning the writ. And then, whether this action is within the statute of limitations? AND HELD not, for though it be not a matter of record till the writ be returned, yet it is founded upon a record, and has a strong relation to it." For reports of the earlier consideration of Cockram v. Welby, see 1 Mod. 245 (1677); 2 Mod. 212 (1677); Freeman, 236 (1677).

C. Customary Duty.

BANK OF ORANGE v. BROWN AND OTHERS.

3 Wend. 158.—1829.

Savage, Ch. J.—This is an action on the case against six defendants as common carriers, alleged to be the owners of the steamboat Constellation, charged in the first eight counts of the declaration with having received bank bills to a large amount for transportation from the city of New York to the village of Newburgh, which it is averred were lost through the want of due care, and by the negligent and improper conduct of the defendants and their servants. The ninth count is in trover, to which the defendants have pleaded the general issue. To the first eight counts they have pleaded in abatement that fifty-four other persons, together with the defendants, are joint owners and proprietors of the steamboat Constellation, and are *jointly* liable for any damage the plaintiffs may have sustained. The plaintiffs have demurred, and the question presented for adjudication is, whether it is necessary to *join* all the joint owners in this suit?

It is not denied that in an action against joint contractors as such, all must be joined, and if the action be brought against a part only those who are sued may plead in abatement the non-joinder of the other joint contractors. Nor is it denied that in an action for a *tort* the plaintiff may prosecute all or any portion of those concerned in such tort. But an action on the case against common carriers, upon the custom of the realm, seems in England not to be considered always as belonging entirely to the class of actions arising *ex contractu,* nor to those arising *ex delicto,* but is said sometimes to be a case arising *ex delicto quasi ex contractu.*

Every person who undertakes to carry, for a compensation, the goods of all persons indifferently is, as to the liability imposed, to be considered a common carrier. There is an implied undertaking on his part to carry the goods safely, and on the part of the owner to pay a reasonable compensation. No special agreement is necessary to enable the owner to maintain assumpsit against the carrier for breach of his duty, nor to enable the carrier to maintain assumpsit for his compensation. There is therefore a perfect contract implied between the carrier and his employer. As this contract is implied by law, so also where any person becomes a common carrier by professing to carry for all persons indifferently, the law imposes upon him duties and liabilities arising out of his public employment, and imposes upon the employer the liability of making compensation. Considerations of public policy, and not agreements between the parties, have ascertained the duties and fixed the limits of the liability of common carriers, and for any omission or neglect of duty an action lies without stating any consideration or contract

between the parties, for the negligence is the cause of the action and it is not necessary to state or rely upon an assumpsit. Coggs v. Bernard, 2 Ld. Raym. 909. There may be and often is a special contract made with a common carrier and such special contract is to control, but without any agreement whatever, the bare delivery of goods to the carrier imposes upon him the obligation to dispose of them according to the directions which he receives, and a neglect to comply with such directions subjects him to an action, because, says Lord Holt, "a neglect is a deceit to the bailor, for when he entrusts the bailee upon his undertaking to be careful he has put a fraud upon the plaintiff by being negligent, his pretense of care being the persuasion that induced the plaintiff to trust him, and a breach of a trust, undertaken voluntarily, will be a good ground for an action." 2 Ld. Raym. 919. This was said in relation to Lord Holt's sixth class of bailments, where the bailee acts without compensation, but applies with equal if not greater force to his fifth classification, where the bailee acts for a reward.

The form of action against a common carrier is a question which has been considerably agitated in the English courts and has been different as the *gravamen* was supposed to arise upon a breach of public duty, or the breach of mere express promise. Each form has its advantages and disadvantages. If assumpsit is brought, or the action be laid as arising upon contract, it may be abated for the non-joinder of proper parties, but it survives against the personal representative, and the common counts may be joined in the declaration. If the action be laid as arising *ex delicto,* and founded on the custom, the suit does not abate for the non-joinder of all the proper parties, and, in a proper case, a count in trover may be joined. "The present usage," says Mr. Jeremy, in his Law of Carriers, p. 117, "sanctions the principles and adopts the advantages of both forms of action by permitting the cases to be considered either way, as arising *ex contractu* or *ex delicto,* according as the neglect of duty or breach of mere express promise is meant to be relied upon as the cause of injury." Mr. Chitty supposes the plaintiff has his choice of remedy (1 Chitty's Pl. 75, 6), and that in an action founded upon the custom, no advantage can be taken of the non-joinder of defendants, and refers to the cases which were cited upon the argument. He has given precedents of declarations both ways (2 Chitty, 117 and 271, 2), according to which the declaration in this case is clearly founded upon the negligence of the defendants and not upon an express promise.

It may be useful to review very briefly some of the leading cases in the English courts on this subject. [Here follows a discussion of Boson v. Sandford, 2 Show. 478; Rice v. Shute, 5 Burr. 2611; Abbott v. Smith, 2 Bl. 947; Dale v. Hall, 1 Wils. 281;[1] Mitchel v. Tar-

[1] Apparently the first reported case (1750) in which an assumpsit implied by law was allowed against a common carrier.—Ames, History of Assumpsit, 2 Harvard Law Rev. 63.

burt, 5 T. R. 649; Buddle v. Wilson, 6 T. R. 369; Govett v. Radnidge, 3 East 62; Dickon v. Clifton, 2 Wils. 319; Powell v. Layton, 5 Bos. & Pul. 365; Max v. Roberts, 12 East 89; Bretherton v. Wood, 3 Broad. & Bing. 54.]

It is not to be denied that there has been a difference of opinion between some of the English judges on the question whether an action against a common carrier is an action founded on a tort or on a contract. Dallas, chief justice,[1] seems to put that question at rest, by bringing it to a very fair test: does it require the plaintiff to show a contract, express or implied, to support it? The action on the case was at last decided to be for a tort or misfeasance. This was clearly the opinion of Lord Mansfield in the case [Cowp. 375] cited by Ch. Justice Mansfield,[2] and all the cases in which it has been held necessary to join all the joint owners have been said by distinguished judges to be clearly actions upon a promise. Much of the confusion has probably grown out of the forms of declaring in some of the cases, where it is difficult to determine whether the promise and undertaking often stated in the count, or the custom of the realm, also stated, is intended by the pleader to be the foundation of the action.

I apprehend the true rule now is, that an action solely upon the custom is an action of tort; that in such action all or any number of the owners of a vessel, coach, or any kind of conveyance used by common carriers, may be sued, and judgment may be rendered on a verdict against all or a part only of those against whom the action is brought; the plaintiff has his choice of remedies, either to bring assumpsit or case, and that when one or the other action is adopted it must be governed by its own rules. But if the plaintiff states the custom, and also relies on an undertaking, general or special, as in Boson v. Sandford and some others, then the action may be said to be *ex delicto quasi ex contractu,* but in reality is founded on the contract and to be treated as such.

In Allen v. Sewall, 2 Wendell 338, in giving the opinion of the court, I remarked that all the co-partners should have been sued, as the action was *quasi ex contractu.* It was unnecessary in that case to say anything on that point, as no plea in abatement had been pleaded, and upon further examination I am satisfied the remark is incorrect for the reasons above assigned.

It is certainly now settled in England that an action against a common carrier upon the custom is founded on a breach of duty, that it is a tort or misfeasance, and it follows that it is joint or several.

In the case now under consideration all the counts are substantially upon the custom and in case, though some of them contain expressions similar to those used in actions of assumpsit; but there is

[1] In Bretherton v. Wood, *supra.*
[2] In Powell v. Layton, *supra.*

none of them which relies upon any undertaking of the defendants, and they all state the gravamen to be a breach of duty.

I am therefore of opinion that an action on the case against a common carrier belongs to the class of actions arising upon a tort or misfeasance *ex delicto,* and that such actions being as well several as joint, it is unnecessary to join all the joint tort-feasors. The demurrer is well taken, and the plaintiff is entitled to judgment of *respondeas ouster.*

Justices SUTHERLAND and MARCY did not hear the argument of this case and gave no opinion.[1]

ROCKWELL v. PROCTOR.

39 GA. 105.—1869.

WARNER, J.—This was an action instituted by the plaintiff in a justice-court against the defendant, as an innkeeper, to recover the value of a lost overcoat, proven to be worth $30.00. The case was brought before the superior court by writ of *certiorari,* alleging that the justice-court erred in not dismissing the case for want of jurisdiction, and that the verdict was contrary to law and without evidence to support it. The superior court sustained the *certiorari* on both grounds, which decision of the superior court is assigned for error here.

This was not an action of *trespass* but an action upon the *implied contract* of the innkeeper. There is always, in law, an *implied contract* with a common innkeeper, to secure his guests' goods in his inn: 3d Bl. Com., 164. Private duties may arise, either from statute, or flow from relations created by contract, express or *implied.* The violation of any such specific duty, accompanied with damages, gives a right of action. When a transaction partakes of the nature both of a tort and a contract, the party plaintiff may *waive* the one and rely solely upon the other: Revised Code, §§ 2903, 2904. The justice-court had jurisdiction of the subject-matter of the suit in this case, the more especially as the defendant plead to the merits of the action without excepting to the jurisdiction of the court: Code, 3409.

An innkeeper is bound to extraordinary diligence in preserving the property of his guests entrusted to his care, and is liable for the same if stolen, when the guests have complied with all reasonable

[1] Accord, that the action may be either contract or tort, Wood v. Milwaukee & St. Paul Ry., 32 Wis. 398 (1873).

"The earliest reported case of indebitatus assumpsit upon a customary duty seems to be City of London v. Goree, 2 Lev. 174, 1 Vent. 298, 3 Keb. 677, Freem. 433 s. c." [1676].—Ames, Hist. of Assumpsit, 2 Harvard Law Rev. 65.

rules of the inn: Code, 2091. It is not necessary to show actual delivery to the innkeeper; depositing the goods in a public room set apart for such articles is a delivery to the innkeeper: Code 2092; Sasseen & Whitaker v. Clark, 37 Ga. R. 242. The overcoat was deposited on a shelf in the hotel, as directed by the person in charge thereof by the permission of the innkeeper, during his absence. It was the duty of the innkeeper, either by himself or competent servants or agents, to take charge of the goods of his guests, and if he allowed persons to officiate in that capacity during his absence in his hotel, he is responsible for their conduct and for the loss of the goods deposited therein as directed by such servants or agents; and it is no sufficient answer for the innkeeper to say, after the goods are lost, that the persons whom he *permitted to officiate* in that capacity during his absence were not *his* servants or agents. In our judgment the verdict of the jury in the justice court was right, under the law and facts of the case, and that the court below erred in sustaining the *certiorari*. Let the judgment of the court below be reversed.[1]

[1] Accord, Morgan v. Ravey, 6 H. & N. 265 (1861); Dickinson v. Winchester, 4 Cush. 114 (1849),—assumpsit against an innkeeper for loss of a trunk by a hackman in the employ of the innkeeper to carry between railroad station and hotel.

In Stanley v. Bircher, 78 Mo. 245, an action by a guest against the executor of an innkeeper for damages for personal injuries sustained by the guest by falling down a shaft in the hotel, the court said: "It is claimed by counsel for plaintiff that the action is for the breach of a contract, and that it is not an action on the case for injuries to the person. The allusions in the petition to the formal contract between the plaintiff and the proprietor of the hotel, whereby the plaintiff became a guest in the hotel, cannot change the true character of the action. In setting forth an action of trespass on the case the pleader often finds it proper, although not absolutely necessary, to mention matters of contract connected with the tort by way of inducement and explanation. In this case the relation of host and guest, which originated in contract, explains how the defendant's testator came to owe the plaintiff a duty. That duty, however, the law imposes. It is a public duty which is not defined by the contract. Neither can the proprietor relieve himself from that duty by contract. The action in truth is for a violation of the duty which the law imposes independent of contract. Neither the damages nor the scope of the action can be measured or limited by the contract."

In De Wolf v. Ford, 193 N. Y. 397 (1908), an action was brought to recover damages which plaintiff claimed to have suffered through the acts of defendant's servant who forced his way into plaintiff's room in defendant's hotel and addressed insulting language to her. The action was sustained on the ground of a breach of an implied contract by which an innkeeper undertakes to protect his guests from insult or injury by employees. (Theory of the action stated in opinion below, 119 N. Y. App. Div. 808, 810.)

PART III.

RECOVERY UPON THE DOCTRINE THAT ONE PERSON SHALL NOT BE ALLOWED TO ENRICH HIMSELF UNJUSTLY AT THE EXPENSE OF ANOTHER.

A. INTRODUCTORY—QUASI-CONTRACT AND TRUE CONTRACT DISTINGUISHED.

COLUMBUS, HOCKING VALLEY & TOLEDO RY. CO. v. GAFFNEY.

65 OHIO ST. 104—1901.

MINSHALL, C. J.—The real question in the case, and the only one we shall consider, aside from one of pleading and evidence, is whether, on the admitted facts, the plaintiff below, Gaffney, was entitled to recover of the defendant on an implied contract the value of the services for which he claims compensation. The plaintiff had a contract with the general government, by which, for a compensation, he was bound to carry the mails to and from the depot of the Columbus, Hocking Valley & Toledo Railway Company to the post office at Lancaster, Ohio, and also to and from the Cincinnati & Muskingum Valley Railway Co. at the same place. These two roads at this point form a junction, the roads running on opposite sides of a common depot, within forty feet of each other. Each of these roads had a contract with the government for carrying mails over its road, by which each was required to transfer the mails over its road to that of the other, when required in the course of transit, as the distance between them was less than eighty rods, the contract with the government imposing that duty on each when the distance between them is no greater. During the entire period for which compensation was claimed this work had been performed by the plaintiff,—a period of over six years,—part of the time under a contract of the government with one Turner, of which the plaintiff was the assignee, and the residue of the time under a contract with himself; the terms of both contracts being alike. The plaintiff during the entire time supposed that it was his duty, under his contract

with the government in regard to carrying the mails between the depot and the post office, to make this transfer between the two roads, and performed the service under this impression until he was informed by an agent of the government that it was not his duty, and was ordered to desist from doing so. No demand for compensation was made until he had received this order from the government agent, and he at no time supposed that he was entitled to any until this time; nor was there any express request on the part of the company or its agents for the performance of the service, the company having agents of its own at the depot, who should have performed the service. It also appears that at the time Turner assigned his contract to the plaintiff he informed him that this service was a part of his duty under the contract with the government. On this state of facts it is claimed that a contract should be implied on the part of the defendant to pay the plaintiff what his services were reasonably worth in so transferring the mails for the defendant at the depot. The common pleas rendered a judgment in his favor for $603.58, being for a period of some six years, and the judgment was affirmed on error by the circuit court.

There is some confusion in the statement of the law applicable to what are frequently called "implied contracts," arising from the fact that obligations generically different have been classed as such, not because of any real analogy, but because, where the procedure of the common law prevails, by the adoption of a fiction in pleading—that of a promise where none in fact exists, or can in reason be supposed to exist—the favorite remedy of implied assumpsit could be adopted. This was so in that large class of cases where suit is brought to recover money paid by mistake, or which has been obtained by fraud. Here it is said the law implies a promise to repay the money, when it was well understood that the promise was a mere fiction, and in most cases without any foundation whatever in fact. The same practice was adopted where necessaries had been furnished an insane person, or a neglected wife or child. In all these cases no true contract exists. They are, by many authors, termed "quasi-contracts," a term borrowed from the civil law. In all these cases no more is meant than that the law imposes a civil obligation on the defendant to restore money so obtained, or to compensate one who has furnished necessaries to his wife or child, where he has neglected his duty to provide for them, or, by reason of mental infirmity, is unable to obtain them for himself. But contracts that are true contracts are frequently termed implied contracts,—as where, from the facts and circumstances, a court or jury may fairly infer as a matter of fact that a contract existed between the parties, explanatory of the relation existing between them. Such implied contracts are not generically different from express contracts. The difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, while in the other case the terms are inferred as a matter of fact from the evidence offered of the circum-

stances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. In such cases no fictions are or can be indulged. The evidence must satisfy the court and jury that the parties understood that each sustained to the other a contractual relation, and that by reason of this relation the defendant is indebted to the plaintiff for services performed or for goods sold and delivered.

In the leading case of Hertzog v. Hertzog, 29 Pa. 465, the distinction is clearly stated by Judge Lowrie. After quoting from Blackstone, and observing that his language is open to criticism, he says: "There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of parties to transactions, and are dictated only by their mutual and accordant wills. When the intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed from circumstances really existing, and then the contract, thus ascertained, is called an implied one. * * * It is quite apparent, therefore, that radically different relations are classified under the same term, and this often gives rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are only implied ones. In one case the contract is a mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one the intention is disregarded; in the other it is ascertained and enforced. In one the duty defines the contract; in the other the contract defines the duty." The subject is instructively treated by Professor Keener in chapter 1 of his work on Quasi-Contracts. He expresses the difference between an express contract and a true implied contract as follows: In the one case the language of contract is in terms used, and because of the expressions used the contract is called an express contract; whereas in the other case the contract is established by the conduct of the parties, viewed in the light of surrounding circumstances, and is called a contract implied in fact." The language quoted by counsel for defendant in error from Swan's Treatise, 509, that "an implied contract is established by proof of circumstances showing either that in justice or honesty a contract ought to be implied, or that the parties intended to contract," is doubtless due to "the looseness of thought" on the subject to which the learned judge above refers. The language is quite appropriate to quasi or constructive contracts, frequently classed with implied proper contracts, but wholly inapplicable to true contracts. Swan evidently followed the language of Blackstone that has frequently been criticised.

The rule of evidence applicable to the proof of an implied contract is accurately stated in Abb. Tr. Ev. 358, as follows: "In general, there must be evidence that defendant requested plaintiff to

render the service, or assented to receiving their benefit, under circumstances negativing any presumption that they would be gratuitous. The evidence usually consists in—First, an express request pertaining to the services; or, second, circumstances justifying the inference that plaintiff, in rendering the services, expected to be paid, and defendants supposed, or had reason to suppose, and ought to have supposed, that he was expecting pay, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or, third, proof of benefit received, not on an agreement that it was gratuitous, and followed by an express promise to pay."

It seems, then, clear that no contract can be inferred from the facts in this case; for it does not appear from anything in the case that the plaintiff performed the services for which he sues under a contract with the defendant whereby it was agreed between them that he should be compensated for his services by the defendant in any sum. There could have been no meeting of minds on any of its terms, and without which no contract can exist, whether express or implied. During all this time—some six years—in which he was engaged in doing the work the plaintiff supposed that it was his duty to do it under his contract with the government. He did not, therefore, during the time, regard himself as performing any services for the defendant, and made no claim against it for compensation until after he had been informed that it was not his duty to do what he had been voluntarily doing. This fact negatives the existence of any contract, express or implied, having existed between the parties during the time the services were being performed. The minds of the parties could not have met on the subject of compensation, when the party doing the work had no idea that he was to be compensated by the defendant at the time the work was done. Under such circumstances the understanding of the party for whom the work was done becomes immaterial, unless it had been so communicated to the other party as to have induced the performance of the services, which was not the case if it had any such understanding. But there is nothing in the case to show any such understanding on the part of the company. It is true that under its contract with the government it appears that the transfer of mails from its road to the other was one of its obligations, and the plaintiff, in attending to the matter, performed a service that it, through its agents, should have performed. But no request of the company is here shown by implication, since the company had agents of its own at the depot, and the plaintiff, in doing what he did, performed services that should have been attended to by the employes of the company. And had any claim been made by the plaintiff for compensation, or had the circumstances indicated that he would make such claim, doubtless the company would have directed its own agents to attend to the business. This shows that there was nothing in the conduct of the plaintiff that indicated a purpose on his part to make a claim for compensation at the time the work was performed, and that the

company did not regard itself as receiving services from him for which it was to make compensation. In no view of the case, then, can the suit of the plaintiff be maintained against the company on the ground of an implied contract to pay what the services were reasonably worth.

Though not necessary to the disposition of the case, it may be proper to notice the exception of the defendant to the admission of the evidence offered under the averments of the petition, the claim being that the petition purports to be upon an express contract, while the evidence offered simply tended to support an implied one. We do not think there was error in this regard. The substance of the averments of the petition is that for a period of over six years the plaintiff had been employed by the defendant "at its instance and request" to transfer mails from its trains to the trains of the Cincinnati & Muskingum Valley Railroad Company, at Lancaster, Ohio. There is, as we have shown, no generic difference between an express contract and one implied from circumstances. The plaintiff was not required to state the character of the evidence on which he would rely to support the averment that the services were rendered under a contract with the defendant. It was therefore competent for him to offer the circumstances under which he did the work in support of his averment that it was done "at the instance and request" of the defendant. The evidence was competent, but failed in proof. Judgment reversed, and judgment for defendant.

MILLER v. SCHLOSS.

218 N. Y. 400.—1916.

Collin, J.—The action is to recover the sum of $6,830. The jury rendered a verdict in favor of the defendant. The Appellate Division, upon the appeal of the plaintiffs, reversed the judgment entered upon the verdict and ordered a judgment in their favor for the sum sought to be recovered. From the judgment ordered by the Appellate Division, the defendant appealed to this court. The appeal presents the question of law whether or not the facts presented and the reasonable inferences from them, advantageous to the appellant, constitute an issue of fact. Faber v. City of New York, 213 N. Y. 411.

The following facts have support in the evidence: In 1903 and 1904, the plaintiffs (or their predecessors and assignors) were cotton brokers and members of the New York Cotton Exchange. The defendant secured orders to be executed on the exchange, which he gave to the plaintiffs for execution. The commissions were divided between the parties. Prior to March 25, 1904, the plaintiffs did not in their books of account recognize the customers of the defendant, but treated the defendant as their customer, placing in accounts with him all the transactions through the orders received from him. Subsequent to January, 1904, there were two accounts in those books known respectively as "H. B. Schloss & Co." or as "Account number 1" and "H. B. Schloss & Co. No. 2" or as "Account number 2." Account number 1 resulted almost entirely from orders received from one Barrett. Account number 2 resulted wholly from orders received from one Hunt. Such facts were known to the plaintiffs on and prior to March 25, 1904. The defendant advised the plaintiffs with each order in which account it should be entered. The accounts were treated by the parties as though they were with different individuals, the defendant being called upon to make good a balance against him in either, although in the other there might be a balance in his favor. On March 25, 1904, there was in "account number 1" a balance against him, which, as the plaintiffs knew, neither he nor the customer, Barrett, through whose orders it resulted, was able to pay. "Account number 2" was practically even or without a balance. On that date the defendant received from Hunt an order for the purchase of one thousand bales of cotton. Before the defendant would place the order with the plaintiffs or give them any participation in the account arising from it, and on March 25, 1904, the plaintiffs and the defendant agreed that the account number 2, in which such account should be placed and kept, should be kept separate and distinct, and should not be mixed up in any way with the balance against the defendant in account number 1. Thereupon the defendant delivered the transaction or account to the plaintiffs. During the days intervening March 25th and March

29th, upon the requests of the plaintiffs, in part directly to Hunt and in part to the defendant and by him communicated to Hunt, as margin or for the protection of account number 2, Hunt transferred to the plaintiffs $4,000, which was placed as a credit in account number 2. On March 29th the one thousand bales of cotton were sold or closed out and from the avails of the sale and the $4,000 there was a credit to the defendant in account number 2 of about $6,545. The plaintiffs knew at that time that the credit was created by the deposits made by Hunt and the purchase and sale of the one thousand bales of cotton for him.

On March 30th Hunt directed the plaintiffs to deposit $2,000 to his credit in the American Exchange Bank. They replying that they had no account with him on their books did not comply. On that date they took and thereafter held the position that they would not allow any withdrawal from account number 2 until the defendant had settled the balance against him under account number 1. The defendant insistently claimed that such position was unlawful; that the distinct agreement was that account number 2 should be kept separate and distinct, and that the credit in it was the property of Hunt alone, and for it the plaintiffs were liable to him. After protracted disputation and negotiation, through which the parties were firm in their respective positions, a transaction or settlement was had between them on April 27, 1904, in which the balance against the defendant in account number 1 and his indebtedness to the plaintiffs was wholly discharged upon the books of the plaintiffs by, in part the application to it of the credit in account number 2 and in part by moneys, in the sum of about $8,000, paid to the plaintiffs by parties other than the defendant, and the plaintiffs delivered to defendant a general release of his liability to them. The defendant then stated to the plaintiffs that they had not the right to appropriate to the payment of his indebtedness the credit in account number 2 belonging to Hunt, and expressed to them his belief that Hunt would sue them for the amount of it. The plaintiffs replied that they would make the appropriation and take care of any suit begun by Hunt. They had stated to him some days before that they needed the money. The defendant declared to them and they knew that he was unable to pay Hunt. Subsequently, Hunt recovered, in an action brought, a judgment against the plaintiffs for the amount of such credit. The plaintiffs paid the judgment and brought this action to recover the sum so paid. Their cause of action, as alleged, is that they paid the sum to the defendant upon his promise to pay it "in extinguishment of a liability for said amount due from the said firm of Miller & Company to one C. P. Hunt and in consideration of said promise," which promise he had failed to keep; that they through compulsion of a judgment had been forced to pay such amount to Hunt and that the defendant holds the sum so paid him to their use. The trial court charged the jury that if the defendant, as a part of the transaction of April 27, 1904, agreed, expressly or impliedly, to

pay Hunt the sum of the credit in account number 2, or if the plaintiffs were then ignorant that Hunt was the principal in account number 2 or had any interest therein, the defendant was liable.

The Appellate Division recognized and declared that the action was for moneys had and received. That court reversed the judgment of the trial court and directed judgment in favor of the plaintiffs upon the ground that the defendant promised, through implication, as a matter of law, to pay Hunt the sum of the credit in account number 2, which was appropriated on the books of the plaintiffs in payment of the indebtedness of the defendant to them. The evidence presented an issue of fact. The law defining the nature and the obligations of implied contracts is thoroughly established. The courts recognize by the language of their opinions two classes of implied contracts. The one class consists of those contracts which are evidenced by the acts of the parties and not by their verbal or written words—true contracts which rest upon an implied promise in fact. The second class consists of contracts implied by the law where none in fact exist—*quasi* or constructive contracts created by law and not by the intentions of the parties. A contract cannot be implied *in fact* where the facts are inconsistent with its existence; or against the declaration of the party to be charged; or where there is an express contract covering the subject-matter involved; or against the intention or understanding of the parties; or where an express promise would be contrary to law. The assent of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted. Morse v. Kenney, 87 Vt. 445; Mathie v. Hancock, 78 Vt. 414; Hertzog v. Hertzog, 29 Pa. St. 465; Earle v. Coburn, 130 Mass. 596; Central Bridge Corporation v. Abbott, 4 Cush. 473. Under the law and the stated facts it obviously cannot be held as a matter of law that the defendant is liable to the plaintiffs for the sum recovered by reason of his promise or contract implied in fact that he would pay them. In fact, neither the complaint nor the trial proceeded upon that cause of action.

Nor can the law find in the stated facts a *quasi* contract, or an implied contract *in law*, on the part of the defendant that he would pay the plaintiffs. A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which *ex aequo et bono* belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual, in order to fit the cause of action to the contractual remedy. Board of Highway Commissioners v. City of Bloomington,

253 Ill. 164; Morse v. Kenney, 87 Vt. 445; Columbus, etc., Ry. Co. v. Gaffney, 65 Ohio St. 104. In People ex rel. Dusenbury v. Speir, 77 N. Y. 144, 150, we said: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the *law* implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. Addison on Contracts, 22. And a somewhat similar distinction is recognized in the civil law, where it is said: 'In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone, or natural equity produces the obligation by rendering obligatory the *fact* from which it results. Therefore these facts are called *quasi* contracts, because without being contracts, they produce obligations in the same manner as actual contracts.' 1 Pothier on Obligations, 113." In the cases cited and in other cases will be found many illustrations of the application of the principle under consideration.

The principle has no application here. It must have as a basis, in order to be applicable, the facts that the plaintiffs paid to the defendant and the defendant retained the sum of $6,380 or thereabouts in order that he should pay it to Hunt. The fact that the defendant should have paid Hunt is essential to the basis. The facts did not or do not exist. Each and every act of the plaintiffs was voluntary and with full and exact knowledge on their part. There was not in the transaction mistake, imposition, extortion or oppression. The entire transaction was covered and is controlled by the express agreement or understanding of the parties. Hunt had demanded the payment of the sum to himself and the defendant had directed that the sum be so paid. The plaintiffs knew they owed the sum to Hunt, but they needed and desired to keep the moneys. They on their books of account misapplied them to an account existing between themselves and the defendant in reduction of a balance to the debit of the defendant and the credit of themselves. They knew the defendant was not able or did not intend to pay the sum to Hunt. They did not intend that the defendant should pay the sum to Hunt, and expressly declared their intention to take care of the claim of Hunt. They did not place in the hands of the defendant any money or its equivalent. At the close of the transaction he was no more able, and probably less able, as the plaintiffs knew, to pay Hunt, than he was at its

commencement. They delivered to the defendant no money or its equivalent which he through any fact was obligated to pay over to Hunt or the plaintiffs. As I have stated, at the close of the transaction the result stood precisely as it did at the commencement of this action (except that the plaintiffs had taken care of the claim of Hunt as they declared they would) and as the parties intended and agreed that it should stand. In it there was no fact through which natural equity or good conscience should obligate the defendant to pay the plaintiffs the sum recovered. Giving it its fullest form and expansion, it would be expressed thus: The defendant owed the plaintiffs a sum which he was unable to pay. The plaintiffs owed Hunt a sum which he was demanding of them and the defendant was directing them to pay. The plaintiffs paid to the defendant the moneys they owed Hunt upon the conditions that the defendant repay it forthwith to them in part cancellation of his indebtedness to them, and that they take care of the claim of Hunt. Whatever remedy the plaintiffs may have had against the defendant, it seems clear that it was not the equitable one of an action to recover the sum so paid him, as and for moneys had and received.

The judgment appealed from should be reversed and the case remitted to the Appellate Division to enable it to pass upon the questions of fact presented by the appeal from the order denying the plaintiffs' motion to set aside the verdict and for a new trial, with costs to the appellant.

Willard Bartlett, Ch. J., Chase, Cuddeback, Seabury and Pound, JJ., concur; Cardozo, J., not sitting.

Judgment reversed, etc.

B. Recovery for Benefits Conferred Voluntarily.

1. IN THE ABSENCE OF CONTRACTUAL AGREEMENT.

a. Without Request.

i. *In General.*

INHABITANTS OF SOUTH SCITUATE v. INHABITANTS OF HANOVER.

9 Gray 420.—1857.

Action of contract to recover half the fees paid by the plaintiffs to the commissioners appointed by the governor to establish the boundary line between South Scituate and Hanover, under the resolve of 1856, c. 79, which provided "that the said towns of South Scituate and Hanover shall be required to defray the expenses of said commission, each of said towns paying one-half of said expenses." The plaintiffs had paid the whole fees, without being requested by the defendants so to do.

Bigelow, J.—There is nothing in the facts of this case from which a promise by the defendants, either express or implied, can be inferred to pay the plaintiffs the money sought to be recovered in this action. It is true that the defendants were legally liable, under the resolve of the legislature of May 31, 1856, to pay one-half of the expenses of the commission appointed to establish the boundary line between the towns of South Scituate and Hanover. But this was a liability either to the commissioners or to the commonwealth, and not to the plaintiffs. There is no provision in the resolve, authorizing or requiring the plaintiffs to pay the whole expenses, and rendering the defendants liable for one-half thereof to the plaintiffs. It was a voluntary payment by the plaintiffs of a debt due from the defendants. Such payment gives no cause of action. It falls within the well-settled rule of law, that the payment of the debt of another raises no assumpsit against the person whose debt is paid, and no action will lie by reason of such payment, unless a request, either express or implied, to make the payment is proved. The law does not permit the liability of a party for a debt to one person to be shifted so as to make him debtor to another without his consent. Winsor v. Savage, 9 Met. 348.

Judgment for the defendants.[1]

[1] In Hotchkiss v. Williams, 60 N. Y. Supp. 168 (1899), s. c. 44 App. D. 615, a husband had pledged stock for a loan, and later became insane; while insane he assigned the stock to his wife, who voluntarily paid the loan; it was held that the assignment did not pass title, that she was a volunteer in paying the loan and could not recover from his estate for the amount paid. See also In re Jones' Settlement [1915], 1 Ch. 376, and 29 Har. Law Rev. 228.

MATTER OF RIDER.

68 MISC. (N. Y.) 270.—1910.

(*Surrogate's Court.*)

SEXTON, S.—On the return of the citation in a proceeding to sell real estate for payment of debts, a cited creditor, William S. Cobb, objected to the allowance of the following claims: * * * * Ella R. Theeringer, $333; Margaret Rider, $333, and William F. Rider, $333, on the ground that said claims are not valid claims against this estate. * * * * The only question to be determined is whether the said claims of Ella R. Theeringer, Margaret and William F. Rider, who are the children of the deceased, are valid claims against the estate. The evidence shows that said Ella R. Theeringer, the administratrix, and her said brother and sister received $1,000 from insurance upon the life of their mother, which they shared equally and all of which they pooled to pay off a real estate mortgage and two promissory notes, matured obligations of the deceased. They now seek reimbursement out of the estate on the theory that, by paying these claims, they succeeded to the rights of the creditors of the estate whose claims they had paid. It is claimed by the contestant that all of these payments were voluntary and cannot be recovered back, and that this estate cannot be charged with the amount so paid.

The administratrix testified that she personally paid the mortgage with the equal contributions of herself, brother and sister and took a satisfaction of the same; that in the same manner she paid two notes, and that no demand or request of any kind had been made upon her, or at all, for payment of any of these obligations of the estate. These obligations of the estate were not paid by the administratrix, as such, but by her as an individual, acting for herself and brother and sister. No assignment of the mortgage and notes so paid was taken by her. She took a satisfaction of the mortgage and had it recorded and a receipt for the payment of one of the notes, and never has had the note. These were all obligations of this estate held by creditors. It was the duty of the representative of this estate to pay these claims as such out of estate property. By voluntarily discharging the duty of this estate, by individually paying claims against this estate, such a person cannot thereby become a creditor of this estate. * * * * It is an elementary principle in such actions that money voluntarily paid out by one for another cannot be recovered back. 1 Pars. Con. 471 *et seq.* In order to support such an action, it is essential that a request on the part of the person benefited, to make such payment, either expressly, or fairly to be implied from the circumstances of the case, must be proved. Add. Cont. 1055; Wright v. Garlinghouse, 26 N. Y. 539; Wellington v. Kelly, 84 id. 546; City of Albany v. McNamara, 117 id. 168; Matter of Hotchkiss, 44 App. Div. 615. I, therefore, hold and decide that the payment of claims against this estate by Ella R. Theeringer, Margaret Rider and William F. Rider were voluntarily made, hence are not legal claims against this estate and are disallowed.

HUNTER & CO. v. FELTON.

61 Vt. 359.—1889.

The action was general *assumpsit* by S. N. Hunter & Co. against L. H. Felton. Pleas, the general issue and offset. Heard on referee's report, and exceptions of both parties thereto. The court overruled the exceptions to the report, and gave judgment for the defendant in the sum of $152.78, with interest to be computed by the clerk. Exceptions by both parties.

Ross, J.—The referee's report with reference to items 66 and 67 of the plaintiff's specifications is somewhat meager.

1. In regard to 66, he finds that the logs had been drawn to the pond, about one-half mile from the plaintiff's mill, for the purpose of being sawed at plaintiff's mill. From this fact, and from the fact that the defendant received the lumber when sawed, and paid for the sawing without objection, it is fairly to be inferred that it was mutually understood that the plaintiffs were to take the logs from the place where they were left on the pond, and manufacture them into lumber at their mill. The logs became scattered. We must, in the absence of any facts found to the contrary, presume it was without the fault or neglect of the plaintiffs. The plaintiffs notified the defendant of this fact. He did not withdraw the understanding that they were to go forward and manufacture them, nor did he tell them that he would gather them, nor did he do so. The plaintiffs then, at considerable extra expense, gathered and manufactured the logs into lumber, and the defendant, without objection, took the benefit of this extra labor in gathering the logs. No price had been agreed upon for their manufacture. On these facts, we think, the law implies a contract and agreement on the part of the defendant to pay the plaintiffs a reasonable sum for gathering and manufacturing the logs. He paid for manufacturing them without objection or complaint. Paying for their manufacture without objection was an indorsement of their right to take the logs from the place they did, and manufacture them. If he would avoid paying for gathering the logs, he should have ignored their right to manufacture them, taking them in their scattered condition. He cannot be allowed to treat their necessary labor to bring the logs as they were then situated, into manufactured lumber, in part proper and rightful, and in part wrongful and unauthorized. He must be held to adopt or reject their work on the logs in whole. This item we therefore allow to the plaintiffs.

2. In regard to item 67, the referee finds that the defendant had a large amount of lumber piled up in the plaintiffs' mill-yard, which had remained there over a year. From other parts of the report it appears that they were paid for sawing and sticking up the lumber, and there is no claim made but that it was understood that the defendant had the right to have it remain so stuck up a reasonable

time. After it had remained for over a year, the plaintiffs notified the defendant that his lumber was in their way, and that they must have the space occupied by it for their mill. It is not found that any time was specified in which the defendant must remove it, nor that they notified him that they should charge for storage, if it was allowed to remain on the mill-yard beyond the time named. Nor is it found that the plaintiffs were accustomed to charge for the storage of lumber allowed to remain too long piled up in the mill-yard. We do not think that, on these facts alone, the plaintiffs had the right to charge the defendant with what they paid for the use of other grounds, and for moving their lumber as manufactured to them. To warrant a recovery for such charges, the notice for the removal of his lumber should have been limited to a definite time, accompanied with the statement that, if his lumber was not removed by the time named, they should charge the defendant with what it cost them to secure such accommodations for their lumber as manufactured as the removal of his lumber would afford them; or, if no definite time for its removal was named in the notice accompanied with a statement of their intention to charge, it should be found that the plaintiffs waited a reasonable time for the defendant to make the removal before they procured other accommodations at his expense. On the facts reported a majority of the court do not think that the plaintiffs can recover for this item. * * * *

BOSTON ICE CO. v. POTTER.

123 MASS. 28.—1877.

CONTRACT on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial. Judgment for defendant. Plaintiff alleged exceptions.

ENDICOTT, J.—To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff

and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills v. Snell, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt v. Nelson, 1 Gray, 536, 542; Winchester v. Howard, 97 Mass. 303; Hardman v. Booth, 1 H. & C. 803; Humble v. Hunter, 12 Q. B. 310; Robson v. Drummond, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. Mudge v. Oliver, 1 Allen 74; Orcutt v. Nelson, *ubi supra;* Mitchell v. Lapage, Holt N. P. 253.

There are two English cases very similar to the case at bar. In Schmaling v. Thomlinson, 6 Taunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of Boulton v. Jones, 2 H. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice

of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defense to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

Exceptions overruled.[1]

---

ii. *Performance of Obligation Imposed by Law Upon Defendant.*[2]

FOLGER, J., IN PATTERSON v. PATTERSON.

59 N. Y. 574, 582, 585.—1875.

I HAVE no doubt but that the reasonable and necessary expenses of the interment of the dead body of one deceased are a charge against his estate,[3] though not strictly a debt due from him. The ground of this is the general right of everyone to have decent burial after death, which implies the right to have his body carried, decently covered, from the place where it lies to a cemetery or other proper inclosure, and there put under ground. Regina v. Stewart, 12 Ad. & Ell. 773, citing Gilbert v. Buzzard, 2 Hagg. Consist. R. 333; see, also, Chap-

[1]See "The Doctrine of Boston Ice Co. v. Potter," by Professor Costigan, 7 Col. L. Rev. 32; Holmes Refining Co. v. United Refiners' Co., 33 N. Y. App. Div. 62 (1898). In Barnes v. Shoemaker, 112 Ind. 512 (1887), an order for books was given by S. to P., but was filled by B. at P.'s request; after notice of this fact, S. appropriated the books and was held liable to B. for the price.

[2]For cases on the liability of the husband for necessaries supplied to the wife, and the liability of the parent for necessaries supplied to the child, see these topics in Woodruff's Cases on Domestic Relations.

[3]Accord, Fogg v. Holbrook, 88 Maine 169 (1895). Golden Gate Co. v. Taylor, 168 Cal. 94 (1914); 14 Col. L. Rev. 685.

ple v. Coope, 13 M. & W. 252. In the last case, in which an infant, a widow, was held liable on her contract for the funeral expenses of the burial of her deceased husband, it was said, that "there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it no great extension of the rule to say, that it may be classed as a personal advantage and reasonably necessary to him." This right existing, the law casts upon some one the duty of seeing that it is accorded. 12 Ad. & Ell., *supra.* So it would seem, at common law, that if a poor person of no estate dies, it is the duty of him under whose roof his body lies, to carry it, decently covered, to the place of burial. 12 Ad. & Ell., *supra.* The husband surviving is bound to bury the corpse of his wife; and in his absence, another, a relative, with whom she had lived up to her death, having directed the funeral and paid the expenses, may recover it of the husband. Jenkins v. Tucker, 1 H. Bl. 90; 13 M. & W., *supra;* and see Ambrose v. Kenison, 10 C. B. 776.[1] And where the owner of some estate dies, the duty of the burial is upon the executor. Toller Law of Exrs. 245, bk. 3, cap. 1, sec. 1. And our Revised Statutes (2 R. S. 71, sec. 16) recognize this duty, in that the executor is prohibited from any interference with the estate until after probate, except that he may discharge the funeral expenses. From this duty springs a legal obligation, and from the obligation the law implies a promise to him who, in the absence or neglect of the executor, not officiously,[2] but in the necessity of the case, directs a burial and incurs and pays such expense thereof as is reasonable. Tugwell v. Heyman, 3 Camp. 298. It is analogous to the duty and obligation of a father to furnish necessaries to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits. And so, in Rogers v. Price, 3 Younge & Jervis 28, it was held that an executor, with assets, is liable to a brother of the deceased for the proper expenses of a funeral ordered and paid for by the latter, in the absence of the former. In Hapgood v. Houghton's Executor, 10 Pick. 154, it was held that the law raises a promise on the part of the executor or administrator to pay for the funeral expenses as far as he has assets, and if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. And in Adams v. Butts, 16 Pick. 343, it was held that an account for the funeral expenses of a deceased person might be set off by the defendant in an action against him by the administrator for the work and labor of the deceased in his lifetime. Price v. Wilson, 3 N. & M. 512, is sometimes cited as an authority that "there is no case which goes the length of deciding that if the funeral be ordered by another person, to whom

[1] Accord, Cunningham v. Reardon, 98 Mass. 538 (1868); Gleason v. Warner, 78 Minn. 405 (1899). Infant liable for parent's funeral expenses, Estate of Connolly, 88 N. Y. Misc. 405 (1914); 15 Col. L. Rev. 281.

[2] No recovery where the expenses are paid officiously, Quin v. Hill, 4 Dem. 69 (N. Y. Surrogate's Ct. 1886).

credit is given, the executor is liable." PATTERSON, J., did there use that language. But in Green v. Salmon, 8 Ad. & Ell. 348, he limits the expression, saying: "The judgment there probably means that the executor, where credit has been given to another person, is not liable to the undertaker; if it lays down more, the law stated is extra-judicial." See also Rappelyea v. Russel, 1 Daly 214, where the subject of the liability of a personal representative is well considered by the learned chief justice of the New York Common Pleas. * * * *

The decent burial of the dead is a matter in which the public have concern. It is against the public health if it do not take place at all (Rex v. Stewart, *supra*), and against a proper public sentiment, that it should not take place with decency. Kanasan's Case, 1 Greenl. 226; see Jones v. Ashburnham, 4 East 460; Regina v. Fox, 2 Q. B. 246.

CONSTANTINIDES v. WALSH, EXECUTOR.

146 MASS. 281.—1888.

CONTRACT, upon an account annexed, for the expenses of the funeral of the defendant's testatrix. Writ dated June 18, 1886. Trial in the Superior Court, before BLODGETT, J., who allowed a bill of exceptions in substance as follows: Louisa Constantinides, the plaintiff's wife and the defendant's testatrix, died October 23, 1884, possessed of separate estate, all of which she gave to her son, the step-son of the plaintiff, by her will admitted to probate on November 17, 1884. The plaintiff had no knowledge of the will until three weeks after her death, before which time he had contracted, and on October 27, 1884, had paid a bill for her necessary funeral expenses, which it was agreed was reasonable. It was not contended that the defendant had, prior to or after his appointment, made any promise of payment. The defendant asked the judge to rule that the plaintiff could not recover, and the judge so ruled, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

HOLMES, J.—The funeral expenses of the testatrix were a preferred charge upon her estate. Pub. Sts., c. 135, § 3; c. 137, § 1. St. 1882, c. 141. Under these statutes, and those establishing the independent position of married women with regard to their property, we think that, as between the estate of a married woman leaving property and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral expenses, in all events, as necessaries, irrespective of any fault on his part. If, then, it was still, as formerly, the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures as in other cases when a person has paid in pursuance of a legal duty what, as between himself and another, that other was

bound to pay. There is no technical difficulty in a husband's imposing a liability upon his wife's executor after her death. If it was not the plaintiff's legal duty to do what he did, nevertheless we are of opinion that he stood on no worse ground than a stranger would have done. A stranger could have recovered against the estate of a man, if he was justified in intermeddling. Sweeney v. Muldoon, 139 Mass. 304, 306. And formerly, in the case of a married woman, he could have recovered against her husband. Lakin v. Ames, 10 Cush. 198, 221; Weld v. Walker, 130 Mass. 422, 423; Bradshaw v. Beard, 12 C. B. (N. S.) 344. Undoubtedly he could now recover against her estate. If so, the husband can. In such a matter it is not to be presumed that the husband waives his legal rights, and makes a gift to the estate of his wife, in the absence of any expression or other evidence to that effect.

Exceptions sustained.[1]

MANHATTAN FIRE ALARM CO. v. WEBER ET AL.

22 Misc. (N. Y.) 729.—1898.

(*Supreme Ct., Appellate Term.*)

APPEAL by the plaintiff from a judgment of the District Court in the city of New York for the first judicial district, rendered in favor of the defendants by the justice thereof, without a jury.

GIEGERICH, J.—On the 1st day of September, 1896, the defendants became the lessees of a certain music hall or theater in the city of New York, in which plaintiff had theretofore installed, for a former lessee, five fire-alarm boxes. These remained upon the premises until the 16th day of September, 1897, when they were removed by the plaintiff, who seeks to recover for having maintained such service during the period mentioned. The defendants contest the claim on the ground that neither of them requested the service and merely suffered the alarm signals to remain upon the premises, pending plaintiff's attempt to secure from them a contract for their maintenance in the future. Plaintiff, while conceding that the defendants did not expressly assent to, or promise to pay for, a continuation of the service, nevertheless bases its right to recover upon the theory that the facts and circumstances of the case bring it within the rule that, where one voluntarily accepts and avails himself of valuable services, rendered for his benefit, when he has the option to accept or reject them, with knowledge that the party rendering the same expects payment therefor, a promise to pay may be inferred even without distinct proof that they were rendered at his request. Lawson on Contracts, § 34; Benjamin on

[1]Accord, Pache v. Oppenheim, 93 N. Y. App. Div. 221 (1904); contra, Staple's Appeal, 52 Conn. 425 (1884); contra if the husband is able, Smyley v. Reese, 53 Ala. 89 (1875), In re Weringer, 100 Cal. 345 (1893).

Principles of Contract, § 18; 1 Parsons on Contracts (8th ed.), 486; Day v. Caton, 119 Mass. 513; 20 Am. Rep. 347; Davidson v. Westchester Gas Light Co., 99 N. Y. 559, 566. The difficulty with this position, however, is that the testimony upon which it is based was contradicted. * * * *

There was sufficient evidence in the case to support a finding either way. But it was the function of the trial justice to determine on which side the weight of the evidence inclined, or that the evidence did not preponderate in favor of the plaintiff, and, having found for the defendants upon a conflict of evidence, we should not disturb his conclusions. Weiss v. Strauss, 14 N. Y. Supp. 776; Lynes v. Hickey, 4 Misc. Rep. 522.

The plaintiff could at any time have discontinued the service by disconnecting the wires and so rendering the apparatus worthless; but it did not see fit to do so, and merely because of such omission it cannot impose a liability on the defendants, in the absence of their request to maintain it.

Plaintiff further contends that the defendants were under a legal duty to maintain, upon their premises, an apparatus such as it had installed there, and we infer therefrom that the rule invoked is, that where an obligation is imposed by law upon one to do an act, because of the interest which the public has in its performance, and he fails to perform it, another who performs it, with the expectation of receiving compensation, should be allowed to recover against the former. Keener on Quasi-Contracts 341. The burden, however, is on the person making such a claim to establish the necessity for his intervention, as well as that the act done should have been performed by the person from whom recovery is sought. Id. 347.

In Keener on Quasi-Contracts, 349, the learned author says: "To charge a defendant for services rendered in the discharge of an obligation which he, the defendant, should have performed, the plaintiff must establish a necessity for his, the plaintiff's action. In a case where the reason for the appeal to the plaintiff is the fact that the defendant had failed in his obligation, then no notice is necessary. If, however, the defendant has not refused to discharge his obligation, and his failure to act has been due to his want of opportunity, he must, if he is in a position to act, be given the opportunity before any one will be justified in acting in his stead."

The Consolidation Act, among other things, provided that "the owners or proprietors of all * * * theaters and music halls * * * shall provide such means of communicating alarms of fire, accident or danger to the police and fire departments, respectively, as the board of fire commissioners or the board of police commissioners may direct." Laws of 1882, chap 410, § 454, as amended by Laws of 1892, chap. 703, § 1.

There was no direct proof that the public authorities ever adopted plaintiff's system, but it is fairly deducible, from the letter of Feb-

ruary 19, 1897, that it had been installed in some of the theaters in the city of New York by their consent.

There is no pretense whatever that the plaintiff's system was the only one which had received official sanction during the period plaintiff claims to have maintained the service, and, therefore, the defendants were not confined in their choice to the service furnished by the plaintiff. Moreover, the record fails to disclose whether or not any other fire alarm system was provided by the defendants during the period in question. But aside from this there was no necessity for the plaintiff to maintain its service upon the defendants' premises, as the public authorities had ample power to compel the defendants to discharge the duty which the law imposed (Laws of 1882, chap. 410, § 465, as amended by laws of 1892, chap. 703, § 3), and hence, even though the evidence might have justified the inference that the plaintiff expected to be remunerated for maintaining the service, it cannot recover upon the ground that it, in the public's interest, discharged an obligation imposed by law upon the defendants. Keener on Quasi-Contracts, 344, 347; Force v. Haines, 2 Harr. 385.

For these reasons, to my mind, the judgment should be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.[1]

[1]One who supplies necessaries to a pauper can recover for the same from a town, when it is the legal duty of the town to support the pauper and its proper officers have refused to do so. Trustees of Cincinnati v. Ogden, 5 Ohio 23 (1831).—A county recorder received deeds for filing and recording and was paid the fees. He filed them but did not record them, and they were recorded by his successor in office. "Having received *all* the fees and performed only a *part* of the services, he must pay to his successor in office that part of the fee in each case which is payable for the services performed by plaintiff [the successor]." Davis v. Thompson, 1 Nev. 17 (1865).

MACCLESFIELD CORPORATION v. GREAT CENTRAL RAILWAY.

[1911] 2 K. B. 528.

A canal company, the predecessors in title of the defendants, acting under powers conferred upon them by a private Act of Parliament, made a canal, and in so doing cut through an old highway, which they carried by a new bridge over the canal. The roadway of the bridge having fallen out of repair and become dangerous, the plaintiffs, who were the highway authority for the district, called upon the defendants to do the necessary repairs to the roadway, and, upon their refusal to do so, did the work themselves and brought this action to recover the cost thereof from the defendants.[1]

KENNEDY, L. J.—* * * * The difficulty which I, in common with the other members of the Court, feel to be insuperable is the difficulty of finding legal grounds upon which, having done work which they were not bound to do, the local authority can recover. If it could have been shown that the plaintiffs were legally compellable to do the work, I should say that, having been compelled to do something which the railway company ought to have done, the plaintiffs might recover; but the authorities, as Farwell, L. J., has pointed out, are clear to show that it would be a sufficient defence in a case of this kind, were proceedings taken against the local authority for non-repair of the roadway passing over the bridge, to show that Parliament by this private Act in a section which, so far as regards the portion with which we are concerned, has to be construed for the public benefit, not for the benefit merely of an individual or a set of private individuals, has ordered that the repair is to be done by the company. In such a case it could have been pleaded as a defence to proceedings against the local authority that the burden had been thrown upon another body, and therefore the common-law liability had been, as it were, extinguished by the will of Parliament. Not being under a statutory obligation to pay for or to do the work, this local authority has done the work and incurred expense in doing it, and I do not know the legal principle upon which in those circumstances they can throw the burden upon some one else who ought in the first instance to have done the work, and who therefore is in a position to say "You who seek to recover this payment from me have acted as volunteers." In those circumstances, it appears to me that on one of the grounds taken by the Divisional Court, whilst I should not assent to the main reason upon which the judgment proceeded, their decision was sound, and therefore we must dismiss this appeal.[2]

[1] This statement is from the headnote.—Ed.
[2] Criticized in 25 Har. L. Rev. 77-79.

iii. *Performance of Defendant's Contractual Obligation.*

MOODY v. MOODY.

14 ME. 307.—1837.

ASSUMPSIT for the board of one William Jones, with the usual money counts in the declaration. To maintain his action the plaintiff offered to prove, that on March 29, 1830, the defendant had given a bond to said Jones, stipulating therein to maintain him during life in a comfortable manner; that in the summer of 1833 Jones applied to the plaintiff to board him, that he did board him with the knowledge of the defendant; and that the defendant had neglected and refused to furnish Jones with such comfortable maintenance. And the plaintiff contended, that he was entitled to recover on such proof; but the judge was of opinion that on this evidence there was no privity of contract, and directed a non-suit; to which the plaintiff excepted.

SHEPLEY, J.—To maintain this action there must be a contract between the parties either express or implied. The evidence reported does not prove any express contract; and the only evidence from which one can be implied in law is, that the defendant was bound for the support of one Jones; that he neglected and refused to afford him such support; and that Jones applied to the plaintiff to board him, and the plaintiff did board him with the knowledge of the defendant. The defendant's neglect to fulfill his contract with Jones did not authorize another person to assume the performance of it, and substitute himself as the creditor of the defendant. The law never implies a contract to substitute one creditor for another. The defendant has a right to say, *"non in haec foedera veni."*

It may have been supposed, that there existed some analogy between this case, and that of a wife forced by the ill usage of the husband to leave his dwelling, and carrying with her a right to charge him with her support, by obtaining it from another person. There is no such analogy of legal rights. The case of the wife depends upon the peculiar relations of husband and wife. She is entitled by law to a support, and if unable to obtain it from the husband, she can maintain no suit against him to recover damages, or to obtain the means of compensating another for the necessaries supplied. Considering that for many purposes husband and wife are to be regarded as one person, the law, under such circumstances, implies that her contracts are the contracts of the husband, for the purpose of affording her, in the only way in which it can be done, the necessaries of life at the charge of the person by law obliged to afford them. There is no such relation, nor any such necessity in this case; and the law will imply no such contract. The person entitled to support may, in his own name, enforce his rights, and obtain the means of fulfilling his own contracts with others. The exceptions are overruled and the nonsuit is confirmed.[1]

[1] Accord, Savage v. McCorkle, 17 Ore. 42 (1888).

FORSYTH v. GANSON, AND OTHERS, ADMINISTRATORS.

5 WEND. 558.—1830.

ASSUMPSIT. The action was brought for the support and maintenance of Esther Ganson, the mother of the plaintiff, and the stepmother of the intestate. It appeared when the father of the intestate married Esther Ganson, she was possessed of property to some considerable amount; in 1804, the father of the intestate bought a place and went into the business of tavern keeping; his sons, John the intestate and James the administrator, lived with him after they arrived of age and carried on business together. In 1811, a division was made of all the property between John and James, John receiving $1,000 more than his brother, and agreeing to support his father and stepmother, and accordingly did so until the death of his father, which happened about two years after the division of the property; after the death of his father, John refused to continue to support his stepmother, when her son, the plaintiff in this cause, took her to his house, and now brought his action against the administrators of John, to recover for her support and maintenance.

SUTHERLAND, J.—If the plaintiff can recover at all, it must be on the ground that the intestate, John Ganson, was legally bound to support his stepmother, Esther Ganson, and that having refused to provide for her, the law implies a promise on his part to pay the plaintiff whatever he has necessarily expended in her support. There is no evidence, either of a request on the part of the intestate to the plaintiff to provide for Esther Ganson, or of an express promise to pay him for supporting her. The jury, by their verdict, have found that the intestate either had funds in his hands which he was bound to apply to the support of his stepmother, or that upon a good consideration he had promised to provide for her; and I think the verdict is warranted by the evidence in the case. * * *

The remaining inquiry is (admitting the intestate to have been legally bound to support Mrs. Ganson), whether this action can be maintained in the name of the present plaintiff. I am of opinion that it can. It appears to me to be analogous to the case of necessaries furnished to a wife or infant child for whom the husband or father improperly neglects or refuses to provide. In such cases the law raises an implied promise, on the part of the husband and father, to pay for such necessaries. 8 Johns. R. 72; 13 id. 480; 14 id. 188; 1 Esp. 270; 2 id. 739; 3 id. 1; 1 H. Black. 90; 3 Bos. & Pul. 252; 5 id. 148; 16 Johns. Rep. 281. In Nurse v. Craig, 5 Bos. & Pul. 148, the husband had expressly covenanted with A., as trustee for his wife, to pay his wife a weekly allowance of five shillings; the wife lived with A., and the husband having neglected to pay the stipulated sum, A. brought an action of *indebitatus assumpsit* against him for board and other necessaries furnished to his wife, and the action was sustained, notwithstanding the express covenant

on which it was admitted the plaintiff might have sued. The intestate in this case being legally bound to provide for Mrs. Ganson, the services and supplies afforded to her by the plaintiff were advantageous to the defendant, and may well be considered as having been rendered at his request.

New trial denied.[1]

---

iv. *Preservation of Property.*

CHASE v. CORCORAN.

106 Mass. 286.—1871.

Gray, J.—The evidence introduced at the trial tended to prove the following facts: The plaintiff, while engaged with his own boats in the Mystic River, within the ebb and flow of the tide, found the defendant's boat adrift, with holes in the bottom and the keel nearly demolished, and in danger of sinking or being crushed between plaintiff's boats and the piles of a bridge unless the plaintiff had saved it. The plaintiff secured the boat, attached a rope to it, towed it ashore, fastened it to a post, and, after putting up notices in public places in the nearest town, and making other inquiries, and no owner appearing, took it to his own barn, stowed it there for two winters, and during the intervening summer made repairs (which were necessary to preserve the boat) and for its better preservation put it in the water, fastened to a wharf, and directed the wharfinger to deliver it to any one who should prove ownership and pay the plaintiff's expenses about it. The defendant afterwards claimed the boat; the plaintiff refused to deliver it unless the defendant paid him the expenses of taking care of it; and the defendant then took the boat by a writ of replevin, without paying the plaintiff anything. This action is brought to recover money paid by the plaintiff for moving and repairing the boat, and compensation for his own care and trouble in keeping and repairing the same, amounting to twenty-six dollars in all.

The plaintiff testified, without objection, that the boat, when found by him, was worth five dollars. He was then asked by his counsel, what, when he found it, he considered it worth. This evidence was properly rejected as immaterial.

The plaintiff requested the chief justice of the superior court to rule that the boat was not lost goods, within the sense of the Gen. Sts., c. 79. But the learned judge refused so to rule, and ruled that upon all the evidence the plaintiff could not maintain his action, and directed a verdict for the defendant. We are of opinion that this was erroneous.

There is no statute of the commonwealth applicable to this case. Chapter 78 of the Gen. Sts., concerning "timber afloat or cast on

[1] But see Case v. Case, 203 N. Y. 263 (1911).

shore," is expressly limited in all its provisions to "logs, masts, spars, or other timber," and does not include boats or vessels. Chapter 79, relating to "lost money or goods," and "stray beasts," found in any town or city, clearly applies to lost property found on land only, and not to property afloat on tide-waters, without the limits of any city or town, and within the admiralty jurisdiction of the United States, 3 Dane Ab. 135. Chapter 81 is "of wrecks and shipwrecked goods." These words, in their ordinary legal meaning, are confined to ships and goods cast on shore by the sea, and cannot be extended to a boat or other property afloat, not appearing to have been ever cast ashore, or thrown overboard or lost from a vessel in distress. Hale De Jure Maris, c. 7; 1 Hargr. Law Tracts, 37; 3 Dane Ab. 133; Sheppard v. Gosnold, Vaugh. 159, 168; Palmer v. Rouse, 3 H. & N. 505; Baker v. Hoag, 3 Selden, 555, 558.

The claim of the plaintiff is therefore to be regulated by the common law. It is not a claim for salvage for saving the boat when adrift and in danger on tide-water; and does not present the question whether the plaintiff had any lien upon the boat, or could recover for salvage services in an action at common law. His claim is for the reasonable expenses of keeping and repairing the boat after he had brought it to the shore; and the single question is, whether a promise is to be implied by law from the owner of a boat, upon taking it from a person who has found it adrift on tide-water and brought it ashore, to pay him for the necessary expenses of preserving the boat while in his possession. We are of opinion that such a promise is to be implied. The plaintiff, as the finder of the boat, had the lawful possession of it, and the right to do what was necessary for its preservation. Whatever might have been the liability of the owner if he had chosen to let the finder retain the boat, by taking it from him he made himself liable to pay the reasonable expenses incurred in keeping and repairing it. Nicholson v. Chapman, 2 H. Bl. 254, 258 and note; Amory v. Flyn, 10 Johns 102; Tome v. Four Cribs of Lumber, Taney 533, 547; 3 Dane Ab. 143; Story on Bailments, §§ 121 a, 621 a; 2 Kent Com. (6th Ed.) 356; 1 Domat, pt. 1, lib. 2, tit. 9, art. 2; Doct. & Stud. c. 51; Preston v. Neale, 12 Gray, 222.

Exceptions sustained.[1]

[1] Accord, Bryant's Estate, 180 Pa. 192 (1897), where an agent in sole charge of his principal's estate was allowed compensation for caring for the estate after the death of the principal, who died suddenly without leaving known heirs.

As to whether an executor named in a will, which is later legally declared to be invalid, may recover from the administrator of the deceased, the expenses of the unsuccessful attempt to establish the will, see Dodd v. Anderson, 197 N. Y. 466 (1910), and cases cited therein pro and con.

BECKWITH v. FRISBIE.

32 Vt. 559.—1860.

The defendants, private carriers, contracted late in the fall tc transport by canal boat a cargo of oats for the plaintiff from Burlington to New York. The parties both expected that the boat would reach New York that fall, but owing to the lateness of the season, and without any fault on the part of the defendants, the boat was frozen in the canal, at Fort Edward, and was obliged to lie there all winter. It was necessary for the safety of the boat and cargo that the oats should be taken from the vessel and stored during the winter, and the defendants accordingly procured this to be done. At the opening of navigation in the spring the oats were reloaded and carried to New York. Plaintiff had paid $75 of the freight in advance and, after the boat was frozen in, had advanced to the captain of the boat $25 who was in need of money to pay the expenses of the boat. Defendants paid $46.96 for the storage of the oats while they were delayed at Fort Edward. Upon the arrival of the cargo at New York defendants claimed the full freight (less the $75 paid in advance); the $46.96 paid for storage; and would not deduct the $25 advanced by plaintiff to the captain for expenses of the boat. In order to get his oats plaintiff complied with the demands and now sues to recover the $25 paid to the captain; seventy-five cents for oats fed from the cargo by the captain to the boat's horses; and the $46.96 paid for storage.

Aldis, J.—* * * * The next charge allowed by the county court is for forty-six dollars and ninety-six cents, paid for storage and care of the oats at Fort Edward. The defendants' boat was obstructed by ice at Fort Edward, and could proceed no further till spring. The defendants had used all reasonable diligence and dispatch in proceeding from Burlington to that point, and so far are not chargeable for any fault or neglect. The safety of the cargo, and of the boat also, required that the oats should be removed and safely stored, and this was done by the captain.

The closing of the canal by ice was an act of Providence which excused the defendants from proceeding further till navigation opened. Thereupon it was their duty to use ordinary care in preserving the property, and this they did. The inquiry now arises, who shall bear the expense of storing the property safely through the winter, the plaintiff or the defendants? Nothing was said about it in the contract. It was not in their contemplation when the bargain was made, and no provision was made in regard to it. Both expected and intended that the cargo should reach New York that fall, but both knew that the freezing of the canal might prevent it. The price which the plaintiff was to pay the defendants was six cents per bushel, for *freight,* for transporting the cargo to New York. It did not contemplate that the property should be stored

during the winter at some point while on the way. Had either party expected this the voyage would not probably have been begun. Had the question been raised when the contract was made, it seems very plain to us that the plaintiff could not reasonably have asked, nor would the defendants have agreed, that they should bear the expense of it. It is expense bestowed on the plaintiff's property, and for his benefit; it preserves his property, but does not aid the defendants' interest, which was simply to transport the cargo to New York. We think that equity between these parties requires that this expense should be borne by the plaintiff. And if he was so liable in equity he could not shift the burden on to the defendants by refusing to pay what it was his duty to pay. The law raises an implied promise on his part to pay the defendants for what they might be obliged to expend in preserving his property, when that duty was thrown upon them by their having his property in their care as carriers, and were prevented from completing their contract by an act of Providence. If he has paid it he cannot recover it back. * * * *

EARLE v. COBURN.

130 MASS. 596.—1881.

CONTRACT upon an account annexed for the board and stabling of the defendant's horse, from April 14, 1877, to January 17, 1878. Answer, a general denial. Trial in the superior court, before DEWEY, J., who reported the case for the determination of this court, in substance as follows:

It was in evidence that, prior to April 14, 1877, the plaintiff had exchanged the horse in question with the defendant for a wagon; that a controversy arose between them as to the character of the transaction, and its effect upon the title of each in the property exchanged; that the defendant returned the horse to the stable of the plaintiff, and demanded of him the wagon; that the plaintiff refused to deliver the wagon, and the defendant thereupon left the horse on the plaintiff's premises and brought an action against the plaintiff for a conversion of the wagon; that at the trial of that action the then plaintiff introduced evidence to show that the transaction was of such a character that the then defendant acquired no title in the wagon, and that he acquired no title in the horse; and evidence was introduced by the then defendant to show that the exchange was complete, and that he acquired title to the wagon and parted with his title to the horse; and that in that action the jury returned a verdict for the defendant, upon which judgment was duly entered by the court.

It was also in evidence at the trial of the present action that, at the time the defendant left the horse at the plaintiff's stable, both

parties disclaimed ownership; that the plaintiff told the defendant that if he left it on his premises he must do so on his own responsibility and expense; that the defendant told the plaintiff he would have nothing more to do with the horse, and would not be responsible for it; that, on August 1, 1877, the plaintiff told the defendant that he had got a horse of his at his stable and should charge him for its board and keeping, and that the defendant replied that he had no horse at the plaintiff's stable.

The horse was fed and stabled by the plaintiff during the whole time embraced in the declaration, and the defendant made no other provision for his care and keeping, and did not demand him of the plaintiff, and gave him no orders respecting the same; and the plaintiff testified that he never sent the defendant any bill for board and stabling of the horse, and never made any demand except as stated in the interview of August 1, 1877.

Upon this evidence, the judge ruled that the action could not be maintained, directed a verdict for the defendant, and reserved the question of the correctness of the ruling for the determination of this court.

Lord, J.—This case cannot be distinguished in principle from Whiting v. Sullivan, 7 Mass. 107. In that case it was said, "As the law will not imply a promise, where there was an express promise, so the law will not imply a promise of any person against his own express declaration; because such declaration is repugnant to any implication of a promise." As applicable to that case and to the case at bar, this language is entirely accurate. There may be cases where the law will imply a promise to pay by a party who protests he will not pay; but those are cases in which the law creates a duty to perform that for which it implies a promise to pay, notwithstanding the party owing the duty absolutely refuses to enter into an obligation to perform it. The law promises in his stead and in his behalf. If a man absolutely refuses to furnish food and clothing to his wife or minor children, there may be circumstances under which the law will compel him to perform his obligations, and will of its own force imply a promise against his protestation. But such promise will never be implied against his protest, except in cases where the law itself imposes a duty; and this duty must be a legal duty. The argument of the plaintiff rests upon the ground that a moral duty is sufficient to raise an implied promise, as well as a legal duty. He cites no authority for this proposition, and probably no authority can be found for it. The common law deals with and defines legal duties, not moral. Moral duties are defined and enforced in a different forum. Under the particular circumstances of this case, it would be futile to inquire what moral duties were involved, or upon whom they devolved. It is sufficient to say that no such legal duty devolved upon the defendant as to require him to pay for that for which he refused to become indebted. In Boston Ice Co. v. Potter, 123 Mass. 28, the court refused to hold the defendant to an implied promise to pay for ice which he had received

and consumed during a year or more; and this upon the ground that a promise will not necessarily be implied from the mere fact of having derived a benefit. The cases arising in this country and in England are collated in the opinion in that case. Those cases, equally with Whiting v. Sullivan, *ubi supra,* sustain the ruling of the presiding judge in this case.

Judgment on the verdict.[1]

BARTHOLOMEW v. JACKSON.

20 JOHNS. (N. Y.) 28.—1822.

IN error, on *certiorari* to a justice's court. Jackson sued Bartholomew before a justice, for work and labor, etc. B. pleaded *non assumpsit.* It appeared in evidence, that Jackson owned a wheat stubble-field, in which B. had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, J. sent a message to B., which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of B. answered, that they would remove the stack by ten o'clock the next morning. J. waited until that hour, and then set fire to the stubble in a remote part of the field. The fire spreading rapidly, and threatening to burn the stack of wheat, and J., finding that B. and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for B.; and he claimed to recover damages for the work and labor in its removal. The jury gave a verdict for the plaintiff for fifty cents, on which the justice gave judgment, with costs.

PLATT, J., delivered the opinion of the court. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a *certiorari* on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant; and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action. The judgment must be reversed.

Judgment reversed.

[1] Accord, Force v. Haines, 2 Harr. (N. J.) 385 (1840); Coleman v. United States, 152 U. S. 96 (1893).

CALVERT v. ALDRICH.

99 Mass. 74—1868.

Foster, J.—The issue in this action is on an account of one cotenant in common against another to recover from the defendant in set-off part of the cost of certain needful repairs made by the plaintiff in set-off upon the common property. It was not founded upon any contract between the parties, but upon a supposed legal obligation which, if its existence were established, the law would imply a promise to fulfill.

The doctrine of the common law on this subject is stated by Lord Coke as follows: "If two tenants in common or joint tenants be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione facienda,* and the writ saith *ad reparationem et sustentationem ejusdem domus tenantur,* whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." Co. Litt. 200 b; Ib. 54 b. And in another place he says: "If there be two joint tenants of a wood or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood or corn," but if there be two joint tenants of a house, the one shall have his writ *de reparatione facienda* against the other. This is said to be because of "the preeminence and privilege which the law gives to houses which are for men's habitation." Bowle's Case, 11 Co. 82.

In Carver v. Miller, 4 Mass. 561, it was doubted by Chief Justice Parsons whether these maxims of the common law, as applied to mills, are in force here, especially since the provincial statute of 7 Anne, c. 1, revised by St. 1795, c. 74. * * * *

Doane v. Badger, 12 Mass. 65, was an action on the case. The plaintiff had a right to use a well and pump on the defendant's land; and the defendant had removed the pump and built over the well, thereby depriving the plaintiff of the use of the water. The judge before whom the case was tried had instructed the jury that the defendant, by the terms of a deed under which he claimed, was bound to keep the well and pump in repair, although they were out of repair when he purchased, and, without any previous notice or request, was liable in damages for the injury the plaintiff had sustained by his neglect to make repairs. The court held that no such evidence was admissible under the declaration, the cause of action stated being a misfeasance, and the proof offered being of a nonfeasance only; also, that a notice and request were indispensable before any action could be maintained. Mr. Justice Jackson in delivering the opinion made some general observations, unnecessary to the decision of the cause, the correctness of which requires a particular examination. He said that the action on the case seems to be a substitute

for the old *writ de reparatione facienda* between tenants in common, and could not be brought until after a request and refusal to join in making the repairs. He added: "From the form of the writ in the register, it seems that the plaintiff, before bringing the action, had repaired the house, and was to recover the defendant's proportion of the expense of those repairs. The writ concludes, '*in ipsius dispendium non modicum et gravamen.*' It is clear that until he had made the repairs he cannot in any form of action recover anything more than for his loss as of rent, etc., while the house remains in decay. For if he should recover the sum necessary to make the repairs, there would be no certainty that he would apply the money to that purpose." Mumford v. Brown, 6 Cowen 475, a *per curiam* opinion of the Supreme Court of New York, and Coffin v. Heath, 6 Met. 80, both contain *obiter dicta* to the same effect, apparently founded upon Doane v. Badger, without further research into the ancient law. If it were true that the writ *de reparatione* was brought by one cotenant, after he had made repairs, to recover of his cotenant a due proportion of the expense thereof, there would certainly be much reason for holding an action on the case to be a modern substitute for the obsolete writ *de reparatione.* But all the Latin forms of the writ in the Register, 153, show that it was brought before the repairs were made, to compel them to be made under the order of court. Indeed, this is implied in the very style by which the writ is entitled, *de reparatione facienda,* viz.: of repairs to be made; the future participle *facienda* being incapable of any other meaning. This also appears in Fitzherbert, N. B. 127, where the writ between cotenants of a mill is translated; the words, *in ipsius dispendium non modicum et gravamen,* quoted by Judge Jackson, being correctly rendered, "to the great damage and grievance of him," the said plaintiff. Fitzherbert says: "The writ lieth in divers cases; one is, where there are three tenants in common or joint or *pro indiviso* of a mill or a house, etc., which falls to decay, and the one will repair but the other will not repair the same, he shall have this writ against them."

In the case of a ruinous house which endangers the plaintiff's adjoining house, and in that of a bridge over which the plaintiff has a passage, which the defendant ought to repair, but which he suffers to fall to decay, the words of the precept are, "Command A. that," etc., "he, together with B. and C., his partners, cause to be repaired." The cases in the Year Books referred to in the margin of Fitzherbert confirm the construction which we regard as the only one of which the forms in that author are susceptible, namely, that the writ *de reparatione* was a process to compel repairs to be made under the order of court. There is nothing in them to indicate that an action for damages is maintainable by one tenant in common against another because the defendant will not join with the plaintiff in repairing the common property. In a note to the form in the case of a bridge, it is said in Fitzherbert: "In this writ the party recovers his damages, and it shall be awarded that the defendant

repair, and that he be distrained to do it. So in this writ he shall have the view *contra*, if it be but an action on the case for not repairing, for there he shall recover but damages." There is no doubt that an action on the case is maintainable to recover damages in cases where the defendant is alone bound to make repairs for the benefit of the plaintiff without contribution on the part of the latter, and has neglected and refused to do so. See Tenant v. Goldwin, 6 Mod. 311; s. c. 2 Ld. Raym. 1089; 1 Salk. 21, 360.

The difficulty in the way of awarding damages in favor of one tenant in common against his cotenant for neglecting to repair is, that both parties are equally bound to make the repairs, and neither is more in default than the other for a failure to do so. Upon a review of all the authorities, we can find no instance in England or this country in which, between cotenants, an action at law of any kind has been sustained, either for contribution or damages, after one has made needful repairs in which the other refused to join. We are satisfied that the law was correctly stated in Converse v. Ferre, 11 Mass. 325, by Chief Justice Parker, who said: "At common law no action lies by one tenant in common, who has expended more than his share in repairing the common property, against the deficient tenants, and for this reason our legislature has provided a remedy applicable to mills." The writ *de reparatione facienda* brought before the court the question of the reasonableness of the repairs proposed, before the expenditures were incurred. It seems to have been seldom resorted to; perhaps because a division of the common estate would usually be obtained where the owners were unable to agree as to the necessity or expediency of repairs. Between tenants in common, partition is the natural and usually the adequate remedy in every case of controversy. This is the probable explanation of the few authorities in the books, and of the obscurity in which we have found the whole subject involved. But if we have fallen into any error in our examination of the original doctrines of the common law of England, it is at least safe to conclude that no action between tenants in common for neglecting or refusing to repair the common property, or to recover contribution for repairs made thereon by one without the consent of the other, has been adopted among the common-law remedies in Massachusetts.

This result is in accordance with the rulings at the trial.

Exceptions overruled.

COSGRIFF ET AL. v. FOSS ET AL.

152 N. Y. 104.—1897.

ACTION of partition.

VANN, J.—The question presented by this appeal is whether a tenant in common, who is also a lessee of his cotenant, can be allowed in partition for improvements made upon the property in the

course of his tenancy, which enhanced its value, and were made with the knowledge, but without the consent, of the cotenant, when the effect of such improvements was not to protect or preserve the property, but to aid the tenant in carrying on a business then prosecuted by him upon the premises, the increased income from which was not shared with the cotenant.

At common law, a tenant in common, who has made permanent improvements, as distinguished from ordinary repairs, upon the common property, cannot recover from his cotenant any part of his expenditures for that purpose, unless they were made at the request or with the consent, express or implied, of the latter. Mumford v. Brown, 6 Cow. 475; Jackson v. Bradt, 2 Caines 302; Taylor v. Baldwin, 10 Barb. 582, 590, 626; Putnam v. Ritchie, 6 Paige 390, 405; Crest v. Jack, 3 Watts 238; Gregg v. Patterson, 9 Watts & S. 197, 209; Story, Eq. Jur., § 1235; Knapp on Partition 10. In some states this is the rule, even when the expenditure was necessary to keep the property from going to ruin; while, in others, repairs essential to preservation may be made at the expense of the cotenants, in proportion to their respective shares, without their consent, especially if such consent is unreasonably withheld after due request. It is strictly limited to repairs, however, and does not extend to improvements not essential to protect the property, but designed to enhance its value. Loring v. Bacon, 4 Mass. 575; Beaty v. Bordwell, 91 Pa. St. 438; Stackable v. Stackpole (Mich.), 32 N. W. 808; Wiggin v. Wiggin, 43 N. H. 561; Alexander v. Ellison, 79 Ky. 148; Hancock v. Day, 36 Am. Dec. 293.

The rule of courts of equity upon the subject is more liberal, and extends to improvements in special cases; as, in an action of partition, for instance, the court acts upon the principle that the party who asks for equitable relief will be required to do what is equitable himself. The rule, however, is carefully limited to those cases where special circumstances give rise to strong equitable rights. Putnam v. Ritchie, 6 Paige 390; Ford v. Knapp, 102 N. Y. 135, 6 N. E. 283.

Some authorities sanction repairs that are absolutely necessary to preserve houses and mills, already erected and in being, but refuse to extend the rule to other kinds of property. Dech's Appeal, 57 Pa. St. 467, 472; Anderson v. Greble, 1 Ashm. 136, 139. Chancellor Kent says: "One joint tenant, or tenant in common, can compel the others to unite in the expense of necessary reparations to a house or mill belonging to them, though the rule is limited to those parts of the common property, and does not apply to fences inclosing wood or arble land." 4 Kent Comm. 370. Other cases permit improvements to be set off against rents and profits, but not charged against the body of the estate, unless made with the knowledge and consent of the other owners. Pickering v. Pickering, 63 N. H. 468, 3 Atl. 744; Luck v. Luck, 113 Pa. St. 256, 6 Atl. 142; Jones v. Jones, 23 Ark. 212. Where one tenant in common, who was in possession, supposing himself to be the legal owner of the

entire premises, erected valuable buildings thereon, he was held entitled to an equitable partition, so as to give him the benefit of his improvements. Town v. Needham, 3 Paige 546. So, in an action for partition, where actual division is possible, the cotenant who has made substantial improvements upon one parcel is usually allotted the part that he has enhanced in value, or so much thereof as represents his share in the whole tract. Freem. Coten., § 509; 17 Am. & Eng. Enc. Law 758. But, when the property is so situated that actual partition is out of the question, even courts of equity, in this state, do not require contribution for improvements, as distinguished from repairs, except in the case of mills, houses, and the like, under circumstances of special necessity. The erection of a new and independent building, the improvement of farming lands by fencing or drainage, the opening of mines or quarries, or the making of changes that are in no sense designed to protect or preserve the property, but simply to improve it and increase its value, do not warrant the court in requiring a cotenant who has not consented to contribute to the expense. This is just, as an extension of the rule from repairs to general improvements, in the nature of new erections, might enable one cotenant to "improve" the other out of his share in the property. The case of Green v. Putnam, 1 Barb. 500, is sometimes cited as an authority sanctioning an allowance for the erection of a new building without consent. In that case, however, the plaintiff had been consulted, and had consented to the construction of a smaller building, but objected when it was ascertained that a larger one was in process of erection. The allowance made was "limited to the sum necessary for erecting the smaller building, and no relief was granted for the amount expended without the plaintiff's consent."

The leading cases in this state are Scott v. Guernsey, 48 N. Y. 106, which is relied upon by the respondents, and Ford v. Knapp, 102 N. Y. 135, 6 N. E. 283, which is relied upon by the appellant. In the former case, two remaindermen, without the consent of the others, but with the consent of the life tenant, erected buildings upon the premises, under an agreement with the life tenant that they might put up the buildings and receive the rents. One building, erected in 1833, increased the value of the land by $750, and another, erected in 1841, by $200. In 1854, when the life tenant died, the rents received had largely exceeded the value of the buildings and the interest on the investment. It was held that the remaindermen who thus improved the property were not entitled to any compensation therefor, and, upon partition, could not exact reimbursement from, or claim a lien upon, the shares of their cotenants. The court said: "There was no consent, mistake, or other equitable ground in this case for relieving the party who made his investment with full knowledge of the facts, voluntarily, and without any inducement offered by other cotenants. Had the appellants offered to share their rents, upon being paid a due proportion of the value of the improvements after the termination of the life estate, it might have

afforded a better ground to claim compensation. The appellants are not within the reason of any of the adjudged cases, where relief has been granted in partition for money expended in improvements by one of several tenants in common." In Ford v. Knapp "the defendants were tenants in common with one Whittaker of a mill property badly run down, and out of repair." Whittaker's interest was sold upon execution to the defendants, "but subsequent judgment creditors redeemed and acquired the title of the debtor." "During the fifteen months between the sale and redemption, the defendants expended a large amount upon" a gristmill on the premises. Some of the machinery, adapted to and once used for merchant milling, was out of date and not worth repairing, while that necessary for custom work was still in use, but "dilapidated and inefficient." The dam was repaired, a new water wheel made, and the machinery so changed as to do good custom work, which was classed by the referee who decided the case as repairs, "while the addition to the buildings and the introduction of new machinery and appliances for a merchant mill he classed as improvements. These repairs and improvements largely increased the market value of the property. Before they were made, a generous estimate of that value did not exceed $8,000, while on the sale in partition it brought about double that amount." The supreme court refused "any allowance either for repairs or improvements." This court, referring to Scott v. Guernsey, said: "Here were reasons enough for denying any equity to the improving tenant, and the case stands solidly upon its facts, and is not open to criticism. But it does not deny the duty of a court of equity in a proper case to give its relief upon condition of an allowance for improvements, and does not undertake to specify all the cases in which such equity shall be recognized. Nor shall we undertake any such dangerous or impossible effort. The authorities leave us at liberty to consider whether, upon the facts and circumstances of this particular case, the improving tenant ought to be protected, and furnish us the power to grant the protection if it may justly be demanded." After alluding to some of the facts of the case then in hand, the court continued: "The defendants acted in the presence of a peculiar and unusual emergency. They acted in entire good faith. The repairs were necessary, and not merely a venture or speculation, and the improvements were *in the line of restoration,* and not of new and strange enterprise. What they did was natural and normal to the use and character of the property, and such as joint owners of equal ability might be expected to join in making. They offer to share in the increased income thus secured, and in every respect appear to have acted fairly." The court sent the case back for a division of the proceeds of the sale according to the principles stated in the opinion, and for an accounting of the income and profits which the defendants offered to make.

We do not regard the two cases thus reviewed as in conflict. In the one, special equities existed, while, in the other, they did not, and judgment went accordingly. In the earlier case, those who

made the improvement did it as a business venture, and they had received back from it, not only principal and interest but also a large profit, which they did not offer to share with their cotenants. In the later case, those who made the improvements did not make them as a business venture, but to save the property, and prevent the "business and custom" of the mill from drifting "into other hands." What they did was "in the line of restoration," not of independent construction; and when they had done it, and had doubled the value of the property, they offered to share the increased profits with their cotenants. The improvements were made upon a mill and mill dam, which, owing to their peculiar nature, seem always to have appealed strongly to courts of equity for aid through contribution toward repairs and reasonable improvements, so as to keep pace with the times, accommodate the public, and prevent loss of custom.

In the case before us we find no such equitable strength in the claim of the appellant. He sustained the double relation to his cotenants of tenant by lease and tenant in common. Under the former relation he was entitled to no repairs, but was bound by a covenant in the lease to make such as would keep the premises in their normal condition, except depreciation by use and damages by the elements. The improvements were made mainly for the purpose of extending his business and increasing his sales, in which his cotenants had no interest. He had the right, by express contract, to remove all his structures during the term of his lease. The nature of the property did not permit decay, and there was no controlling necessity for making the changes and additions. If they had not been made, the premises would not have depreciated in value. Some of the work was done after this action was commenced, and a part even after the trial was in progress. It does not appear that the appellant offered any share of the profits to his cotenants, or to what extent the value of the premises was increased, or, unless inferentially, that they would sell for any more on account of the improvements. His erections were in the nature of a new and independent construction to enable him to quarry more rock and sell it, and thus, *pro tanto,* he consumed the property. They were not "in the line of restoration," but of a business venture. We know of no well-considered case in this state that would authorize an allowance for improvements under these circumstances. It would be a dangerous extension of the rule governing the subject, which is always applied with caution, to permit one cotenant to run the other in debt, against his will, for unnecessary improvements. Equity requires contribution from tenants in common only to prevent injustice, and, unless the rule is kept well in hand, it is liable to cause more injustice than it prevents. The judgment should be affirmed, with costs. All concur.

Judgment affirmed.

v. *Preservation of Life.*

BRANDNER v. KREBBS.

54 ILL. APP. 652.—1894.

MR. JUSTICE GARY.—February 21, 1893, two men, one the brother of the appellant, and another named Plesher, were hurt by the fall of a scaffold at a building where they were at work.

The appellee, a physician and surgeon, rendered services in the line of his profession to Plesher, and the question in the case is whether the services were rendered at the request, and upon the promise, express or implied, of the appellant to pay for them.

That Plesher was unconscious is not disputed, and the preponderance of the evidence is that the appellant sent a messenger for a doctor, and the messenger brought the appellee, and that after he came, the appellant, in some form of words which is stated variously by the different witnesses, undertook that the appellee should be paid.

The appellant insists that if he incurred any liability, it was only that of guarantor, and that there being no writing, he is protected by the statute of frauds. But to put him in the position of guarantor, it is essential that Plesher should have been liable to the appellee. Brandt Sur. & Guar. 56 *et seq;* Geary v. O'Niel, 73 Ill. 593. Plesher was unconscious when the appellee came to attend upon him, and although the services were for his benefit, and part of them rendered after he regained consciousness, yet there is not a syllable in the evidence indicating that anybody interested ever had a thought that he was liable. The finding of the court, without a jury, that the appellant was the party to whom alone credit was given, cannot be disturbed.

The motion for a new trial assigned as the only ground that "the judgment is contrary to the law and the evidence." Upon such a motion affidavits of new witnesses are not admissible, and therefore those filed are not considered, further than to say that even if newly disclosed evidence had been ground of the motion, the affidavits would have been unavailing. The judgment is affirmed.[1]

[1] Where a patient, unconscious by an accident, was attended by a surgeon, called by a spectator, and died without regaining consciousness, the estate of the patient was held liable to the surgeon. Cotnam v. Wisdom, 83 Ark. 601 (1907). Where a physician was called by an officer of a vessel, without request, to attend a seaman ill of yellow fever, and "the law of the place as well as the feelings of humanity" required that the physician should attend, "the law will imply a promise from him who has received the services to pay for them." Pray v. Stinson, 21 Maine 402 (1842). But the doctrine of these cases would, it seems, "not justify a recovery for physician's services rendered to one accidentally injured, even if rendered unconscious, where immediate attention is not required, and particularly in a city where free ambulance service exists and where free hospital service is furnished by the municipality. * * * The rule founded on the necessity and humanity does not apply." Edson v. Hammond, 142 N. Y. App. Div. 693, 698 (1911).

vi. *Benefits Incidentally Conferred.*

RUABON STEAMSHIP CO. LIMITED AND THE LONDON ASSURANCE.

[1900] APPEAL CASES 6.—1899.

THE Ruabon, belonging to the appellants and insured with various underwriters, including the respondents, while on a voyage suffered damage for which the underwriters were liable. She was taken into dry dock in Cardiff for the purpose of having the necessary average repairs effected. While she was in dry dock the appellants took advantage of the opportunity to have her surveyed by Lloyd's surveyor. About nine months had still to run before a survey was necessary in order that she might retain her classification, but by Lloyd's rules the owner was entitled to call for a survey at the time it was made. The surveyor certified that no reclassification repairs were necessary, and she retained her classification. An average statement was prepared showing that the total amount due from the underwriters in respect of the repairs was £822 14s. 10d., of which the amount due from the respondents was £82 5s. The respondents contended that the expenses of taking the ship into dock and taking her out again, as well as those incurred in the use of the dock, ought to be divided between the owners and the underwriters and claimed to deduct £2 5s. on this account. They therefore paid the appellants £80, which sum was admitted to be enough if the respondents' contention was right. The appellants brought an action against the respondents for the disputed £2 5s. The action was tried before MATHEW, J., without a jury, upon mutual admissions that Lloyd's survey was made as above stated, that docking was necessary for the vessel to pass Lloyd's survey, that items amounting to £55 were necessarily incurred in connection with the docking, but that she did not go into dock for the purpose of Lloyd's survey, that no reclassification repairs were necessary, and that the time had not arrived at which it was necessary for her to pass Lloyd's survey.

MATHEW, J., gave judgment for the defendants on the authority of the *Vancouver case* (11 App. Cas. 573), and this decision was affirmed by the court of appeal (Chitty and Collins, L. JJ., A. L. Smith, L. J. dissenting). [1898] 1 Q. B. 722. The plaintiffs brought the present appeal.

LORD BRAMPTON.—My Lords, I entirely concur in the judgment which has been delivered by the Lord Chancellor.

I take the general rule to be correctly stated by Lord Herschell in the *Vancouver case* (11 App. Cas. 573), that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled to recover the sum properly expended in executing the

necessary repairs, less the usual allowances, as the measure of his loss.

I take it also as admitted that, but for the matter I am about to mention, it would not be disputed that the respondents were liable under their policy to pay, as an indemnity against the loss by perils of the sea which occurred, the full sum of £82 5s. claimed. This represents *prima facie* their responsibility. The respondents seek to reduce this amount by the sum of £2 5s. by reason of a survey of the ship which the plaintiffs, the owners, caused to be made by Lloyd's surveyor, during the period the vessel was under repair on the pontoon, which for this purpose, I may call a dry dock. If they are right in making a reduction on this account, no question being raised as to the amount, the respondents are entitled to retain the judgment pronounced in their favor by the majority of the court of appeal.

Since the decision of the *Vancouver case,* by which, of course, we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea—one of such operations being to effect repairs for the cost of which underwriters are responsible—the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, and neither of such operations could be performed unless the ship were dry-docked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous dry-docking: in such cases the cost of docking and all dock dues during the period the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it.

I do not, however, find anything in the *Vancouver case* which would justify such division of dock dues, unless in such cases as I have mentioned. The present is a very different case. The Ruabon was dry-docked solely to enable the underwriters to effect the repairs for which they were liable and with no other object, and no other repair was, in fact, done or required to be done on the ship; the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to reclassification at Lloyd's and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run. It is quite true that if it had not then been made it would have been necessary, if she were afterwards surveyed, to have incurred the expense of again dry-docking her at owner's expense; and to that extent the owners might have been benefited. I say might, because the owners might have sold

the vessel in the meantime, or some other thing might have occurred to render such survey unnecessary. Assuming, however, that the expense of another dry-docking was in this way saved, and that to that extent the owners were benefited, I think that circumstance is immaterial, and does not warrant a claim for contribution towards the dock dues imperatively incurred on the underwriters' account in the discharge of their obligations. I think that such contribution can only be insisted upon in those cases where work is done to the vessel itself, by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, dry-docking being necessary for each. If the respondents' claim for contribution was allowed, I see no reason why such a claim might not be made against an owner who while his ship was in dry dock sold her, subject to immediate inspection and survey by his purchaser. A variety of other cases similar in character might be suggested. I think the owners, in causing the survey to be made in this case, were taking what Lord Herschell (11 App. Cas. *588) termed "an incidental advantage," "from the fact that a damage arising from a risk within the policy has necessitated repairs at the expense of the underwriters"; and he puts, by way of illustration, the case of a vessel in ordinary course requiring scraping and painting at intervals of five years, and before the time for such operation has arrived, meeting with a disaster by perils of the sea and docked for repairs, for which underwriters were responsible, and the shipowner taking the opportunity of scraping and painting his ship. In repudiating the notion that the entire expenses of the time occupied in that operation should be borne by the shipowner, he adds, "if they were to be borne by him at all." This observation of that noble and learned Lord makes it clear to me that he did not contemplate his judgment covering such a case as this, where nothing was in fact done on the ship and the survey did not in the smallest degree delay the completion or add one farthing to the expense of the repairs done for the underwriter. I think, therefore, that this appeal should be allowed.[1]

[Concurring opinions were also rendered by the LORD CHANCELLOR and by LORD MACNAGHTEN; with simple concurrence by LORD MORRIS, LORD DAVY and LORD ROBERTSON.]

[1] Accord, as to non-recovery for benefits incidentally conferred: United States v. Pacific R. R., 120 U. S. 227 (1887), no recovery from the railroad for railroad bridges rebuilt by the government during the civil war as a military necessity; Loring v. Bacon, 4 Mass. 575 (1808), no recovery from the owner in fee of a room on the lower floor of a house by the owner in fee of the room over it and the roof, who repaired the roof to stop leaks which prevented comfortable occupancy of the whole house. As to the repair of party walls, see note in 66 L. R. A. 673.

b. UPON REQUEST.

i. *In General.*

POTTER ET AL. v. CARPENTER ET AL.

76 N. Y. 157.—1879.

RAPALLO, J.—The plaintiffs in their complaint claim to recover upon a note made by the defendants for $1,116.44, dated April 6, 1874, given in part payment for a stock of goods sold by the plaintiffs to the defendants, and also for various items of services rendered from time to time in the years 1869, 1871, 1872 and 1874, amounting in the aggregate to upwards of $2,000. The defendants in their answer denied the allegations as to the services, and set up as counter-claims an alleged indebtedness of the plaintiffs of $200 for the use of a barn for four years, and of $1,000 for services in teaming for the plaintiffs from 1869 to 1874 at $200 per year, with other counter-claims. The plaintiffs replied that the use of the barn was not worth over $10 a year, that by mutual understanding the plaintiffs let the defendants use their horse and wagon as an equivalent therefor and for the other services claimed in the answer.

The referee found for the plaintiffs for the amount due on the note, and also found that the plaintiffs rendered all the services alleged in the complaint, but disallowed their claims therefor, finding, as to each item, that they were rendered under some agreement that no compensation was to be made therefor except board, influence in getting situations for the plaintiffs, rent of a store and the like. But in respect to the claims for the use of the barn and services in teaming set up in the answer, the referee allowed the full amount claimed by the defendants, and he reported a balance in defendants' favor over and above the amount due on the note of $700.96. There was no proof of any express agreement on the part of the plaintiffs to pay for the services of defendants in teaming, or for the use of the barn, nor was there any proof of the items of the charge for teaming, farther than that it was done by the teams and men employed by the factory of which the defendants had charge and was of almost daily occurrence, and its value was estimated at $200 per year. The testimony on these points is quite loose and general, and from the findings of the referee as finally settled after an appeal to this court, it appears that the defendants frequently used in their business a horse and wagon belonging to the plaintiffs and that neither party kept any account of the services of the horse and wagon or of the team work.

The referee further finds that it was not their intention to keep any such account, but he also finds that the parties did not suppose that one service was equal to the other, and that there was no understanding between them that one service should be set-off against the

other. The referee also found that on the 1st of April, 1874, the defendants were indebted to the plaintiffs upon an open account for goods sold to the amount of $3,283.19, and afterwards paid the same to the plaintiffs, by installments, as follows:

1874.	
May 7	$1,123 13
May 7	140 58
June 13	1,210 22
September 11	814 26
	$3,288 19

These payments were all made after the alleged indebtedness of the plaintiffs to defendants for $1,000 for teaming had accrued, and there is no finding or proof that any such claim was ever set up until this action was brought.

Upon all these facts, and in the absence of proof of any express agreement to pay for the teaming, we do not think that such an agreement could properly be implied. The finding that neither party kept or intended to keep any account of it, is equivalent to a finding that it was not their intention that any charge should be made. The findings show that during all the period covered by these transactions these parties were in the habit of rendering mutual services to each other, and that although they had pecuniary transactions to a considerable amount, these services were not brought, nor intended to be brought, into their accounts. Upon such a state of facts a promise to pay cannot be implied, and these services must be regarded as matters of mutual accommodation for which neither party intended to make any charge against the other. This is not inconsistent with the finding of the referee that the parties did not suppose that one service was equal to the other, or was to be set-off against the other. If neither party intended to keep any account of them there could be no comparison of values, or setting-off of one against the other, for there was nothing to set-off.

The judgment entered upon the report of the referee and the judgment of the General Term should be reversed and a new trial ordered, with costs to abide the event.

All concur.[1]

[1]See also, De Cesare v. Flauraud, 69 App. D. (N. Y.) 299 (1902). In McGuire v. Hughes, 207 N. Y. 516 (1913), a physician sued the mother of a patient who was living with her husband, for services rendered to the patient at request of the mother. The court said: "The general rule that where a person requests of another the performance of services, which are performed, the law implies a promise by the former to pay their reasonable value, has no application in the case of a physician rendering professional services to a third person, if the relation to the patient of the person who requests them, be not such as imports the legal obligation to provide them."

THOMAS v. THOMASVILLE SHOOTING CLUB.

121 N. C. 238.—1897.

ACTION by P. C. Thomas against the Thomasville Shooting Club. From a judgment for plaintiff, defendant appeals. Affirmed.

FAIRCLOTH, C. J.—This action is brought to recover for services rendered in procuring hunting ground leases at the instance of defendant, which were accepted and received by the defendant. The plaintiff testified that when he got up the leases he did not expect to charge for the work, if they should pay balance on his house, which has been paid, and should pay him to take charge of their business at lucrative wages. The defendant's president testified that: "The consideration for getting up the leases was that we were to buy his property, and make him steward of the club at a salary. This was not a contract. It was our intention. * * * Did not employ him as steward because we had a falling out about the house. * * * I told him to get up the leases before we bought the house." So that there was no contract as to the leases, because the construction of a contract does not depend upon what either party *expected,* but upon what both *agreed.* Brunhild v. Freeman, 77 N. C. 128. If A. agrees to render services to B., and it is agreed by both that the services are gratuitous, and not to be charged for, then A. cannot recover. If A. renders services to B., and the work is accepted, the law implies a promise by B. to pay the value of the work. This is too familiar to need citation of authority. There was evidence as to the value of the services and the house, and the jury rendered a verdict in favor of the plaintiff for $160. In apt time, the defendant asked the court to instruct the jury that if the plaintiff, when he got up the leases, expected to make no charge, but expected remuneration afterwards by employment from the defendant, he could not recover for getting up the leases. This prayer was refused, but in lieu thereof his Honor charged that: "If Thomas did not intend at the time to charge for getting up the leases, and this was known to the defendant, then he could not charge and recover for the same; but, if it was not known to the defendant that Thomas did not intend to charge, then Thomas could afterwards sue for and recover for his services in getting up the leases." Exception. We see nothing prejudicial to the defendant in the charge as given, which included, in substance, the defendant's prayer, or so much thereof as he was entitled to. When the law implies a promise to pay for work done and accepted, and there is no agreed price, the laborer may recover the reasonable value of his services, unless there be some agreement or understanding that nothing is to be paid. A physician makes no charge for professional services on his books, and payment is resisted on the ground that the services were intended to be gratuitous, and the jury find that the services were rendered without any agreement to pay a definite sum. Held,

that the law implies a promise to pay what they were reasonably worth. Prince v. McRae, 84 N. C. 674. Here, as the implied promise is not met by any agreement that there should be nothing paid, the plaintiff is entitled to recover.[1] Affirmed.

HEWITT v. ANDERSON ET AL.

56 CAL. 476.—1880.

SHARPSTEIN, J.—The defendant signed and caused to be published an instrument, of which the following is a copy:

"We, the undersigned, promise and agree to pay the sum set opposite our names for the arrest and conviction of any person who has, within the past six months, maliciously, and with intent to commit arson, burned any building in the town of San Bernardino, or who may in the future, with said intent, set fire to, attempting to burn, or shall burn, or cause to be burned, any building in the limits of said town." Opposite the name of each of the defendants a certain amount is set, and the aggregate of those amounts is $900, for which the plaintiff sues. The findings of the court, with one exception, are in favor of the plaintiff. That one is as follows: "That none of the acts of the plaintiff were done with a view to obtaining said reward, or any part thereof, but all of said acts were done without any intention of claiming said reward, or any part thereof."

If this finding is justified by the evidence, the judgment rendered in favor of defendants cannot be disturbed. The evidence upon this point is conflicting. The plaintiff, on the trial, testified that he did do the acts upon which he bases his claim to the reward with a view to obtaining it. On the other hand, there was evidence introduced by the defendants which tended to prove that the plaintiff had stated, under oath, that he had not expected any reward. In view of that conflict, we would not disturb a finding either way. And we are satisfied, that under that finding the plaintiff cannot recover in this action. If he did not do the acts upon which he now bases his right to recover, with the intention of claiming the reward in the event of his accomplishing what would entitle him to it, he cannot recover. If he had not known that a reward had been offered, he might upon the authority of some cases recover. But we are not aware of any case in which it has been held that a party, after disclaiming any intention to claim a reward, could recover it.

Judgment and order affirmed.

[1] In Christianson v. McDermott's Estate, 100 S. W. 63 (Kansas City Ct. of Appeals, 1907), plaintiff rendered services to defendant's testator, there being no family relation. The court said: "The appellant contends that as the plaintiff did not contemplate charging for the services when rendered, but expected to be compensated for them in the deceased's will, she is not entitled to recover. There is some evidence tending to show that she expected to be compensated in that manner; but the evidence shows further that she did expect remuneration in some form, and that the deceased agreed that she should be remunerated. We are at loss to know why, if a remuneration was expected and promised for the services, plaintiff would not be entitled to it, although she did not get it in the form so expected."

WEBSTER ET AL. v. DRINKWATER.

5 GREENL. (ME.) 319.—1828.

ASSUMPSIT for services performed and moneys expended. Mr. Ilsley, the collector of the customs at Portland, being duly authorized by the United States to contract for the building of two new revenue cutters, with their boats and barges, made an agreement under seal with the plaintiffs, who undertook, for a certain sum of money, to build and complete the cutters with their boats, to the satisfaction and approbation of the collector, or such person as he should designate and appoint. The collector, on his part, agreed that upon their completion, and the production of a certificate from the person so appointed, that they were built in all respects according to the contract, he would pay the stipulated sum. The agreement was particular as to the size and manner of finishing and furnishing the vessels, and contained a provision respecting the appointment of a person to superintend the building, and certify that the plaintiffs had performed the contract. Under this provision the defendant was appointed the superintendent; and upon the completion of the vessels and boats contracted for, he gave them the certificate required, which they produced to the collector, and thereupon received of him the money agreed for, and a further allowance for certain extra bills, of which they claimed payment. At the time of this settlement the plaintiffs said to the collector that they had made a bad bargain, and had done more work on the vessels than they were bound to do by the contract, though no more than the defendant, as superintendent, had insisted was within it; and that they should apply to congress for compensation for this extra labor and expense; but they did not then speak of any pretense of claim against the defendant. A petition was accordingly presented to congress, but without success.

The labor and materials which formed the subject of the present suit, were proved to have been furnished at the request and under the direction of the defendant, in his capacity of agent of the United States, he insisting, and the plaintiffs denying, that they came within the meaning of the contract.

Upon this evidence, the chief justice left it to the jury to determine whether any work had been done, or expenses incurred by the plaintiffs, in building and completing the vessels, not required of them by the contract; and if so, whether it was done and incurred under an engagement, express or implied, on the part of the defendant, to pay for the same. And they found for the defendant; certifying moreover, that some extra work had been done, and expense incurred by the plaintiffs, respecting which the defendant assumed to act as the agent of the United States, without authority, by contending that such work was within the terms of the contract, but which was not so considered by the jury. The coun-

sel for the plaintiffs contended that in consequence of this unlawful assumption, the law raised a promise on the part of the defendant to pay for such extra work and expense; and the chief justice reserved that question for the consideration of the court.

MELLEN, C. J.—The question reserved at the request of the plaintiff's counsel, is whether the law implies a promise on the part of the defendant to pay for certain extra work by them done on the vessel, which the jury have found was beyond the terms of the contract, and such as the defendant, as agent, had no right to require. They have found that whatever he did in the premises, was done by him, claiming to act as agent on the part of the United States, though as to such extra work, he exceeded his powers in requiring it; and that he never made any engagement, express or implied, to pay for it. Still it is contended by the counsel, that in existing circumstances, the law raises a promise to pay this extra expense. It is a principle well settled that a promise is not implied against or without the consent of the person attempted to be charged by it. Whiting v. Sullivan, 7 Mass. 107. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received.

The application of these principles is perfectly familiar in those cases where a man is professedly acting in his own behalf, and receives the benefit which is the consideration of promise implied. The point of inquiry is whether the law is the same when the man is acting in a certain transaction as an authorized superintendent, but in some particular in his demand, exceeds his authority, and yet receives no advantage whatever from those services, for the payment of which it is contended the law raises a promise; as in the case under consideration.

The terms of the contract, the character in which the defendant was connected with and acted in the transaction we are examining, and of course, the nature and extent of his authority, were all equally well known to both parties. Both must have supposed that the defendant considered himself as requiring no more than he had a right to require, because, after some dispute, his requisitions were complied with. He was the person appointed by consent of all concerned, to superintend the building of the vessel, and see that she should be built in all respects in conformity to the contract. It is not pretended that in discharge of his duty he did not act fairly and faithfully. On the contrary, the proceedings of the plaintiffs in applying to congress for some allowance, show that they did not rely on any engagement or liability on the part of the defendant. From these facts we do not perceive on what grounds a promise can be implied by law. The defendant was in some respects a judge, in business of that kind, and was so considered; and surely his honest opinion and decision ought not to be considered as subjecting him to an action, as upon an implied promise, because he is found to have transcended his delegated authority in a particular instance. It has, however, been contended by the counsel for the

plaintiffs that if an agent, in making a contract, exceed his authority, he must be holden personally as to the amount of the excess; and several of the cases he has cited may be considered as supporting that position, where there is an express undertaking on the part of the agent; and the doctrine so limited, is not contested by the defendant's counsel. But in the case before us there was no express contract, nor even an implied one, on the part of the defendant, as the jury have found; and his character and duty as superintendent, taken in connection with the manner in which he performed that duty, precludes the idea of a promise implied by law, which could bind him. On what consideration should such a promise be implied? The defendant received no benefit from the services performed beyond the written contract; and the plaintiffs were not bound to perform them, and they never pretended that they were performed on the ground of even a supposed liability on his part. It is urged, however, that the defendant may be fairly held chargeable in this action, upon the well-known principle, that in many cases a man may, as it is expressed, waive a tort, and seek his remedy for damages occasioned by it, in an action of assumpsit. The general principle is not denied; nor the authority of the cases cited to this point; but their application to the case before us is denied on two grounds: first, because in all of them except one, the sum sued for had actually been received by the defendant in money, or in services of which he had received the benefit; and in the excepted case the officer received the tonnage duty without any authority of law, and in the same manner had accounted for it to government; an appropriation he had no right to make, and which sum the party suffering could not obtain from government by any legal process. The second reason is that in the present case there has been no tort committed, and so none could be waived. The defendant has merely done what he supposed and believed was his duty, pursuant to the contract, and in the due execution of the powers given him by the collector, and assented to by the plaintiff. Again it has been urged that a man cannot be permitted to avail himself of his own wrong; this is a correct general principle; but if he have violated his neighbor's property or blasted his reputation, he surely may defend himself against that kind of action which the law does not permit to be sustained for redress of the particular injuries complained of.

The jury having negatived the promise alleged, and the facts as reported, affording no ground on which the law will imply a promise, we will merely add that the defendant cannot be adjudged answerable in this action. We have given an answer to each of the arguments which have been urged by the plaintiff's counsel, though we might have omitted it; because some of them could have no bearing upon the facts before us; for it must be distinctly remembered, that the defendant was never the agent on the part of the United States to make a contract with any one; but was merely constituted, by consent of the plaintiffs, an agent for the purpose

of superintending the execution of a contract, which had been previously made between them and Mr. Collector Ilsley.

We are all of opinion that there must be judgment on the verdict.[1]

---

ii. *Family Relation.*

DISBROW v. DURAND.

54 N. J. L. 343.—1892.

THE plaintiff below, who is also the plaintiff in error, sued the administrator of her deceased brother's estate for the value of her services as that brother's housekeeper for the six years which immediately preceded the brother's death; that is, for the value of her services from January 1, 1883, to January 1, 1889. It was proved, on her behalf, at the trial in the circuit court, that the decedent resided upon and cultivated a small farm near Rahway, in Union county; that prior to 1864 his mother lived with him, and that during his mother's life his sister, the plaintiff, then a widow, came to reside with him, bringing with her her son. During the year 1864 the son, having become a man, went away and married. The mother, sister and brother continued to live together as one family until the mother died, and thereafter the brother and sister continued to live together for more than twenty years, until the brother died in January, 1889. The brother cultivated the farm, and the sister kept the house. The sister had no means of subsistence except through work for strangers, or by continuing her home with her brother, or making it with her son. The son offered to take her, but he admits that he did not insist strenuously upon her coming to him. It was plainly apparent in the proofs that she preferred to remain with her brother. No proof was offered to show either an express or implied contract, upon the part of her brother, to remunerate her for her services in his household, or that the subject of compensation for such services was ever discussed between the brother and sister, or contemplated by either of them. Upon this case the judge at the circuit directed that judgment of nonsuit be entered against the plaintiff. Error is now assigned upon exception to that direction.

McGILL, CH.—Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication, from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or that the circumstances under which the

[1] In Borough Co. v. New York, 200 N. Y. 149 (1910), it was held that recovery for work unjustifiably demanded, as being called for by a contract may, if the question was "fairly debatable," be allowed as damages for a breach.

services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered. The proof of the services, and, as well, of the family relation, leaves the case in equipoise, from which the plaintiff must remove it or fail.[1] The great majority of cases in which this exception to the ordinary rule has been given effect have been between children and their parents, or the representatives of the parents' estate; and that fact appears to have led the courts of some of our sister states to speak of it as restricted to cases where such a relationship in blood existed; but it is not perceived how, within the reason for the exception, it is to be limited by mere propinquity of kindred. It rests upon the idea of the mutual dependence of those who are members of one immediate family, and such a family may exist, though composed of remote relations, and even of persons between whom there is no tie of blood.

To this time, in this state, the cases which have treated of this subject have dealt only with the relation of parent and child, or the case where one party stands *in loco parentis,* (Ridgway v. English, 22 N. J. Law 409; Updike v. Titus, 13 N. J. Eq. 151; Smith v. Smith's Adm'rs, 28 N. J. Law 208; Coley v. Coley, 14 N. J. Eq. 350; Updike v. Ten Broeck, 32 N. J. Law 105; Horner v. Webster, 33 N. J. Law 387, 411; Prickett v. Prickett, 20 N. J. Eq. 478; Gardner v. Schooley, 25 N. J. Eq. 150; Miller v. Sauerbier, 30 N. J. Eq. 71; Smith v. Smith's Adm'r, Id. 564; De Camp v. Wilson, 31 N. J. Eq. 656; Kendall v. Kendall, 36 N. J. Eq. 91, 99; Stone v. Todd, 49 N. J. Law 280, 8 Atl. Rep. 300;) but they have not limited the exception to that relation. On the contrary, in Updike v. Titus, *supra,* Chancellor GREEN expressed the opinion that it contemplates "children, parents, grandparents, brothers, stepchildren,[2] and other relations." And in this court in Horner v. Webster, *supra,* Mr. Justice DEPUE approvingly referred to the exception as applicable to all cases where the parties stand "in relation to each other of support on one side and services on the other." Without this state, also, I find most reliable authority extending the exception beyond parent and child, where close family relationship has been shown to exist. For instance, it was given effect in Robinson v. Cushman, 2 Denio 152; Scully v. Scully, 28 Iowa 548; Keegan v. Ma-

[1] Further as to burden of proof see Saunders v. Saunders, 90 Me. 284 (1897), and Ulrich v. Ulrich, 136 N. Y. 120 (1892).

[2] Accord, Kirchgassner v. Rodick, 170 Mass. 543 (1898).

lone, 62 Iowa 208, 17 N. W. Rep. 461; and Hall v. Finch, 29 Wis. 278,—in each of which cases the relation was brother and sister; and in Bundy v. Hyde, 50 N. H. 116, where the relation was brother-in-law and sister-in-law. In the two Iowa cases cited the exception was stated in this language: "Where it is shown that the person rendering the services is a member of the family of the person served, and receiving support therein, either as a child or relative, or a visitor, a presumption of law arises that such services were gratuitous, and, in such case, before the person rendering the service can recover, the express promises of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one receiving and by the other making compensation therefor." I have not pretended to examine the many cases upon this subject in the several states. That would be a tedious, exhaustive, and, indeed, profitless task. The exception stands upon a reason which logically and properly must extend it to all members of a household, however remote their relationship may be, and, indeed, even to those who, though not of kin, stand in the situation of kindred in one household. The proofs offered at the trial in the present case exhibited the existence of a family relationship for a quarter of a century, from which the brother and sister each derived substantial benefit in the services of the other, and that the services rendered by each were natural and appropriate acts in their respective spheres, looking to the maintenance of the common home. It did not appear that in that long period of time either of them entertained the thought of demanding or having compensation from the other. It is deemed that the case is well within the exception to the ordinary rule which has been pointed out. There was no error in granting the nonsuit.

The judgment will be affirmed.[1]

BROWN v. TUTTLE.

80 ME. 162.—1888.

LIBBEY, J.—This action is brought to recover for the plaintiff's labor for the defendant, and money loaned to him at various times between the first of January, 1871, and May, 1884. The case comes here on the testimony of the plaintiff alone, from which it appears that in January, 1871, she and the defendant, by mutual agreement, commenced living together as husband and wife, without being lawfully married, and continued to live in that relation till May, 1884, when the defendant left her and married another woman. During

[1] See also, Collyer v. Collyer, 113 N. Y. 442 (1889).

all the time they lived together they held themselves out to their relatives, friends and the public, as husband and wife. As the fruit of their unlawful union they had a son born to them in the early part of 1872. All the services rendered by the plaintiff were rendered in keeping house as the defendant's wife, and not as his servant. Nothing was said about pay. No pay was expected by the plaintiff. She says, "we agreed to keep house as man and wife;" "as man and wife that were lawfully married." They both labored, and their earnings were used to pay their family expenses. She says, "the money that I turned in was used to pay bills. The money that he earned was turned in; when I wanted a dollar I had it. He always had the money. If I wanted it I always asked him for it." *Question.* "You did not consider this money loaned?" *Answer.* "No, sir; it was turned in just as if I had been his wife." *Question.* "At that time, did you have any expectation of receiving any money?" *Answer.* "Nothing only this way: I expected to spend my days with him, no other way."

The only contention is whether upon these facts the law will imply a promise to pay for the labor performed by the plaintiff, or for the money she earned and delivered to the defendant for the purposes stated by her. The parties were living together in violation of the principles of morality and chastity as well as of the positive law of the state; a relation to which the court can lend no sanction. The services rendered, as well as the money furnished, were in furtherance, and for the continuance of that unlawful relation. The law will imply no promise to pay for either. If there had been an express promise for such a purpose, the court would not enforce it. White v. Buss, 3 Cush. 448; Gilmore v. Woodcock, 69 Maine 118. But the evidence repels any idea of a promise, either express or implied.

Plaintiff nonsuit.

LAFONTAIN v. HAYHURST.

89 Me. 388.—1896.

THIS was an action of assumpsit on an account annexed for board of defendant and family, washing, mending, clothing, and labor for five years, amounting to $1,000. The plaintiff testified that, for a period of about four months, the defendant and his four children lived at her house, during which time she entirely carried on the house, furnished the table, etc., and that after said period, on various occasions, he stayed at her house through a period of several years, from Saturday until Monday, and upon holidays; that she furnished more or less clothing for the defendant and his family, did their washing, and rendered other services; that she also let him have various sums of money. The action was to recover for this

board, and for these services, and for clothing and other things furnished. She testified that, during all of this time, she and defendant were engaged to be married, and it was admitted that on the 24th day of December, 1895, the defendant did marry another woman.

EMERY, J.—No binding promise to make compensation can be implied or inferred in favor of one party against another, unless the one party, the party furnishing the consideration, then expected, and from the language or conduct of the other party under the circumstances had reason to expect, such compensation from the other party.

In this case the plaintiff alleged a promise to make her compensation in money for the various services she rendered to the defendant. She testified, however, that she did not, at the time, expect any compensation in money or money's worth,—that she was engaged to be married to the defendant, and rendered the various services to him solely in consequence of that relation, and of that expectation of marriage. The defendant afterward married another woman, and the plaintiff now claims that the defendant, having repudiated the promise of marriage, must now be held to have promised a money compensation for her services. She cites the case of Cook v. Bates, 88 Me. 455, 34 Atl. 266.

In Cook v. Bates, the plaintiff furnished board to the defendant without expecting money payment, but with the expectation that it would offset the labor furnished by the defendant to her for the same time. The defendant sued for his labor, and obtained judgment by default through some mistake. Thereupon the plaintiff sued for the board, and it was held that a promise to pay for the board could be inferred. The plaintiff expected compensation, not in money, but in money's worth, in the defendant's labor. The defendant, in suing for his labor, indicated an intention to pay for the board in money, and the plaintiff accepted this election. The defendant could not then be heard to say that his labor was to pay for the board.

Marriage, or a promise of marriage, may be a good consideration for a conveyance or a contract, when it appears that the conveyance or contract was made in consideration of the marriage or promise of marriage. In the case at bar, however, the plaintiff's services were not rendered as a consideration for the defendant's promise of marriage. That promise had been made before the rendering of the services, and upon another and different consideration,—the promise of the plaintiff to marry the defendant.

The only contract between them was the mutual promise to marry. If the defendant has broken that contract, her remedy is by an action upon that contract for that breach. The services sued for here were no part of that contract, but merely incidents or consequences of it. The plaintiff expected no pay for them. Her expectation was

confined to the promised marriage. With that she would have been satisfied. With damages for its loss she must be satisfied.

Exceptions overruled.

OSIER v. HOBBS.

33 Ark. 215.—1878.

Eakin, J.—This action was brought before a justice of the peace, to recover compensation for care and attention bestowed by the wife of appellee Hobbs, upon the child of appellant. It was taken by appeal to circuit court, and submitted to the judge sitting as a jury.

The effect of the evidence, as presented in the bill of exceptions, is: that the child, which was feeble and sickly and very young, was given by appellant Osier's wife to Mrs. Hobbs, to be raised. It seems the mother was then in a dying condition. Mrs. Hobbs took the child and kept it some two years or more, rendering it fair motherly attention. During this period appellant did many acts of neighborly kindness to Hobb's family, sending them provisions, furnishing teams, etc. It affirmatively appears that neither party intended to charge for services to the child on one hand, or for articles or labor furnished on the other. Osier, having learned that the child had been corrected by the son-in-law of Mrs. Hobbs, took it away. She was much mortified by this, and Osier afterward told her that he had only taken it temporarily, and meant to return it after her son-in-law left. She made some answer which induced him to believe that she did not desire or urge it, and he never did. It seems further that Mrs. Hobbs had bought a sewing machine in the expectation that Osier would pay for it. When the note became due he refused to do so. This, with other reasons, induced Hobbs to sue for the past services of his wife with regard to the child.

The court refused, at the request of the appellant, to declare the law to be:

"*First*—If the plaintiff and wife, at the time the child was taken to their house to be raised, and during its continuance there, did not intend to charge for board and attention rendered it, he has no cause of action in the case.

"*Second*—If it was understood by and between plaintiff and his wife, and the defendant, during the time the child was at their house, that no charge was to be made against the defendant for board and attention to the child, the plaintiff cannot, afterwards, claim compensation and maintain this action."

The court, instead, made the following declaration:

"Upon the evidence in this case, the defendant is liable to the plaintiff for a reasonable compensation for the care of the infant of said defendant, less the value of the contributions made by the defendant;" and upon that found for the plaintiff the sum of $50. The

court based this finding and conclusion on the ground that defendant permitted the wife of plaintiff to receive his child, an infant, from his (defendant's) wife on her death bed, ***under the belief*** that the plaintiff's wife was to have the child, and raise and care for it as her own, and permitted her to have the care and charge thereof for two years and six months; that he made sundry advancements or contributions of provisions, medicines and clothing, amounting to $175, toward the support of the child, neither party intending to charge the other for these favors, and that defendant afterward took the child away, ***pretending*** that the child was mistreated, and that against the assent of plaintiff.

The general principle is well announced in the instructions asked; that, services intended at the time to be gratuitous, cannot, afterward, be used to raise an implied contract to pay for them; and this was ***the case*** made by the paper filed before the magistrate. It was a simple account against William J. Osier, in favor of Isaac Hobbs, for "board, attention and care" of the child, ***at the request*** of the defendant, from June 16, 1872, to August 1, 1874, $300. According to the findings of the court ***in this action,*** the declarations of law asked by defendants should have been given, and the judgment should have been in his favor.

There is nothing in the whole case to indicate that plaintiff intended or desired to proceed against the defendant on the ground of his wrongful conduct in taking away the child, in violation of his supposed implied contract (which was found by the court to be a fact) to allow plaintiff's wife to keep and raise the child as her own; nor is there any proof of damages incurred by plaintiff or his wife, on account of the tortious conduct of defendant, resulting from loss of future services. We do not mean to say that the injury to the feelings of the wife, in depriving her of the society of the child, to which she may have become very much attached, and her mortification on account of the unjust censure of her conduct, implied by defendant's pretenses, might not have been estimated in the assessment of damages by a jury or a court sitting as such, in an action properly framed for the purpose. We merely mean, that in this action and on the proof there is error in the judgment.

Let the judgment be reversed, and the cause remanded for a new trial.[1]

FULLER v. MOWRY.

18 R. I. 424—1893.

MATTESON, C. J.—This is assumpsit to recover for the services of the plaintiff in the care of, nursing, and attendance on, Mrs. Emily M. Hill, deceased, on whose estate the defendant is administrator *de bonis non,* with the will annexed. The trial below resulted in a

[1] Contra, recovery allowed upon a quantum meruit, Gordon v. Wyness, 169 N. Y. App. Div. 659 (1915). As to the enforceability of a contract with a parent for the custody of his child, see Clark v. Clark, 122 Md. 174 (1913).

verdict for the plaintiff. The defendant now petitions for a new trial on the grounds that the verdict is against the evidence and that the court erred in its rulings.

The testimony shows that the deceased, who was of unsound mind, was taken by her guardian, in the latter part of 1883, from the insane hospital in Worcester, Massachusetts, to the rooms occupied by her sister, the plaintiff, in that city; that from that time to her death in May, 1890, Mrs. Hill continued to reside with the plaintiff, and that, during the whole of this period her condition, both physical and mental, required the constant care and attendance of the plaintiff; that the income of the property owned by Mrs. Hill was applied by her guardians to the support of the ward and of the plaintiff during the period that the ward resided with the plaintiff. The brother of Mrs. Hill, who was her guardian at the time of her removal from the hospital to the plaintiff's apartments, died in 1887. By reason of his death the plaintiff, by Pub. Stat. R. I, cap. 214, § 33, in force at the time of the trial below, was disqualified from testifying as a witness on her own offer as to the contract or understanding between herself and the guardian, and she was not called as a witness for that purpose by the defendant. What were the terms of such contract or understanding, if any there was, therefore, does not appear.

The defendant requested the court to instruct the jury that unless they found an express promise by the deceased, or by either of her guardians in her lifetime, the plaintiff could not recover. The court denied the request and the defendant excepted. This exception and the ground that the verdict is against the evidence are so closely related that they may conveniently be considered together.

As Mrs. Hill was of unsound mind, she was, of course, incompetent to make an express promise; and an express promise by her guardian would not have been binding on her, or her estate, but only on the guardian himself personally. Schouler, Domestic Relations, § 344. The suit is against the administrator of the ward and is based, not on an express contract; but on a contract implied by law for necessaries furnished to the ward. The defendant argues that though the law implies a promise to pay for services rendered and voluntarily accepted, yet when the services are rendered by members of a family living together in one household to each other, no such implication arises for the reason that where the household family relation exists, reciprocal acts of kindness which tend to promote the comfort and convenience of the members of the household are presumed to have been rendered disinterestedly, from mere affection or good will; and, hence, that a plaintiff who sues for such services, to recover, must show affirmatively an express promise of remuneration. Doubtless this argument is sound, so far as it goes, but the principle contended for is subject to the further qualification that if the circumstances in which the services are rendered are such as to show a reasonable and proper expectation that compensation is to be made, the plaintiff will be entitled to recover.

Disbrow v. Durand, 54 N. J. L. 343; Carpenter v. Weller, 15 Hun 134; Bundy v. Hyde, 50 N. H. 116; Guild v. Guild, 15 Pick. 129; Keener on Quasi-Contracts, 315-341.

The testimony shows, as already stated, that Mrs. Hill's condition required the constant care and attendance of the plaintiff, and that the latter, in consequence, gave up her previous occupation in order to render to her sister the care and attendance which were necessary. While it is doubtful if the plaintiff, unless prompted by her sisterly affection, would have been willing to give up her prior occupation and take on herself the burden of caring for, nursing and attending the deceased, suffering as the latter was from the infirmities of mind and body with which she was afflicted, and which rendered her incapable of reciprocating or perhaps appreciating the acts of kindness bestowed upon her, we think that the jury were fully warranted in finding on the testimony a reasonable and proper expectation on the part of the plaintiff that she was to be compensated for her services beyond the mere support which she received from the income of her sister's estate. The only fact appearing which can be urged as inconsistent with such expectation is that the plaintiff made no claim for compensation during the lifetime of her sister. Why she made no claim does not appear, but it is to be borne in mind in this connection that if the fact was susceptible of explanation, the plaintiff was precluded by the statute from making it. It may be conjectured that the income of the estate of Mrs. Hill was barely sufficient for the comfortable support of the household, and that the plaintiff was, therefore, willing to forego, while her sister was living, payment of compensation which could only be made out of the principal of the estate, and which would thereby lessen the income needed for their support. But whether this be so or not, the testimony shows that immediately on the death of Mrs. Hill, and before the existence of a will was known, the plaintiff made her claim for compensation. This prompt presentation of her claim on the death of her sister tends to negative the idea that her claim was an afterthought and to support the view that she expected to receive compensation.

We think that the instruction was properly denied and that the verdict was not against the evidence. * * * *

Defendant's petition for a new trial denied and dismissed with costs.

---

iii. *Rewards.*

DAWKINS v. SAPPINGTON.

26 IND. 199.—1866.

FRAZER, J.—The appellant was the plaintiff below. The complaint was in two paragraphs. 1. That a horse of the defendant had been stolen, whereupon he published a handbill, offering a

reward of $50 for the recovery of the stolen property, and that thereupon the plaintiff rescued the horse from the thief and restored him to the defendant, who refused to pay the reward. 2. That the horse of the defendant was stolen, whereupon the plaintiff recovered and returned him to the defendant, who, in consideration thereof, promised to pay $50 to the plaintiff, which he has failed and refused to do.

To the second paragraph a demurrer was sustained. To the first an answer was filed, the second paragraph of which alleged that the plaintiff, when he rescued the horse and returned him to the defendant, had no knowledge of the offering of the reward. The third paragraph averred that the handbill offering the reward was not published until after the rescue of the horse and his delivery to the defendant. The plaintiff unsuccessfully demurred to each of these paragraphs, and refusing to reply the defendant had judgment.

1. Was the second paragraph of the complaint sufficient? The consideration alleged to support the promise was a voluntary service rendered for the defendant without request, and it is not shown to have been of any value. A request should have been alleged. This was necessary at common law, even in a common count for work and labor (Chitty's Pl. 338), though it was not always necessary to prove an express request, as it would sometimes be implied from the circumstances exhibited by the evidence.

2. It is entirely unnecessary, as to the third paragraph of the answer, to say more than that, though it was highly improbable in fact, it was sufficient in law.

3. The second paragraph of the answer shows a performance of the service without the knowledge that the reward had been offered. The offer, therefore, did not induce the plaintiff to act. The liability to pay a reward offered seems to rest, in some cases, upon an anomalous doctrine, constituting an exception to the general rule. In Williams v. Carwardine, 4 Barn. & Adolph. 621, there was a special finding, with a general verdict for the plaintiff, that the information for which the reward was offered was not induced to be given by the offer, yet it was held by all the judges of the King's Bench then present, Denman, C. J., and Littledale, Parke, and Patteson, JJ., that the plaintiff was entitled to judgment. It was put upon the ground that the offer was a general promise to any person who would give the information sought; that the plaintiff, having given the information, was within the terms of the offer, and that the court could not go into the plaintiff's motives. This decision has not, we believe, been seriously questioned, and its reasoning is conclusive against the sufficiency of the defense under examination. There are some considerations of morality and public policy which strongly tend to support the judgment in the case cited. If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery

that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that any one who has an opportunity to prevent the success of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the second paragraph of the answer.[1]

---

2. IN THE PERFORMANCE OF, OR UNDER THE INDUCEMENT OF, A CONTRACTUAL AGREEMENT.

a. CAPACITY OF PARTIES.

i. *Infants.*[2]

ii. *Insane Persons.*

WALDRON v. DAVIS, ADM'X.

70 N. J. L. 788.—1904.

VREDENBURGH, J.—Under the findings of fact and of law of the trial judge in this cause, a jury having been waived, final judgment was awarded the plaintiff below for the balance of principal money, with interest, as claimed by the plaintiff and specified in the bill of particulars. The declaration was in contract, upon the common counts, and the account as claimed was thus particularized, viz.: "(1) To board and care of said Eliza Van Norden, deceased, from October 1, 1893, to October 1, 1898, 260 weeks, at $4.25 per week, $1,105. (2) To board and care of Eliza Van Norden, deceased, from October 1, 1898, to date of her death, March 13, 1902, 179 weeks and 2 days, at $5 per week, $896.43; total, $2,001.43." Against these charges were credits given for payments made on account of $1,426.75. The only plea filed was the general issue in assumpsit. The plaintiff's evidence at the trial (and there was

[1] Accord, Auditor v. Ballard, 9 Bush (Ky.) 572 (1873); Russell v. Stewart, 44 Vt. 170 (1872); Eagle v. Smith, 4 Houst. (Del.) 293 (1871). Contra, Williams v. West Chicago St. R. R., 191 Ill. 610 (1901), and N. Y. and Tenn. cases cited therein.

[2] See the cases on the disaffirmance of infants' contracts and the restoration of consideration therefor, in Woodruff's Cases on Domestic Relations.

none other offered) exhibited an express contract, made in October, 1893, between the original parties, under which the board and lodging of the deceased were agreed upon at a fixed price. The evidence showed that the deceased boarded with the plaintiff from October, 1893, until the summer of 1898, making monthly payments on account of her board under the contract proved, and then visited her sister until October, 1898, when she returned to the plaintiff's house. Upon her return a great change both in her body and mind was apparent. The evidence clearly shows, and the trial judge found, that the deceased had become *non compos mentis.* While no inquisition was had, nor office found, it is clear from the evidence, and must be conceded, that after October 1, 1898, at least, the deceased became insane. To this mental disorder the physical affliction of cancer was added; and her condition, both mentally and physically, necessitated constant and exacting care and services toward her on the part of the plaintiff. A short extract from the very full testimony on this subject will show that the services rendered and the care given to the deceased by the plaintiff, both before and after October 1, 1898, belonged to a class which in law are properly denominated "necessaries." A witness in the plaintiff's household testified that "she [the deceased] couldn't be left alone. We didn't leave her alone for a number of years—for five years—and never left her alone night and day. * * * Then gradually she became worse, and soiled the rooms, the carpets in four rooms, and the hall, besides her own room—spoiled them, ruined them—and destroyed some of the furniture. * * * She became violent, and couldn't care for herself—had to be attended to, dressed, and so forth, washed and cared for—and she became very noisy and troublesome at the table and in the house, so that no other boarders could be had, because of her constant noises and disturbance. * * * In caring for her, if she was soiled, and we wished to remove her clothing, it would often take two to handle her, because she would kick so. She would fight and scratch and pull hair. * * * One had to hold her feet while the other would get her clothes off."

The counsel of the plaintiff in error did not contend upon the motion for a nonsuit in the court below, nor does he in this court insist, that the deceased after October 1, 1898, was sane, nor that the extra services performed were not necessary to be done for her health and comfort; but the insistment is that no recovery for any sum in excess of that agreed upon can be had on an implied contract to pay for the reasonable worth of such additional services, because the express contract proved excludes an implied contract, or, to use the words of the brief, "an express contract was in existence, covering the entire subject-matter of the suit." But this contention ignores the important change in the contractual relations of the parties which the intervention of the insanity of one of the contracting parties accomplished. After that occurred, the express mutual agreement no longer continued in force. The authorities are all

in such accord upon this head that citation is uncalled for. After that event deprived the parties not only of their power to keep in force the prior mutual agreement, but also of their legal ability to enter into any new one, the law implied a liability on the part of the lunatic, which became binding after her death also upon her estate, to pay, upon *quantum meruit,* what such necessaries were reasonably worth. This principle, also, is so well sustained by authority of both text-books and reported cases that I shall only cite a few of the most pointed, viz.: Van Horn v. Hann, 39 N. J. Law 207; Hallett v. Oakes, 1 Cush. 297; Kendall v. May, 10 Allen 59; Richardson v. Strong, 35 N. C. 106, 55 Am. Dec. 430; Pearl v. McDowell, 3 J. J. Marsh. 659, 20 Am. Dec. 199; 1 Ad. on Con. (2d Am. Ed.), p. 236. In the case, *supra,* of Richardson v. Strong, the action was assumpsit on *quantum meruit* for work and labor—being for the services of a nurse for a madman, and of a guard to protect him from a propensity to destroy himself—and the North Carolina Supreme Court held that "where a person is insane, so as to attempt injury to himself, or the destruction of his property, the services of a nurse and guard fall within the class of necessaries, as defined by law." The finding of the trial judge as to the value of the services rendered by the plaintiff after October 1, 1898, in the care of the deceased, is not here reviewable; nor, indeed, has the correctness of his finding upon that subject been questioned by the counsel of the plaintiff in error. * * * *

---

iii. *Married Women.*

SHEARER v. JOHN FOWLER.

7 MASS. 31.—1810.

THE declaration, which was in case, contained four counts. The last count, upon which alone any question came before the court, was for money had and received by the defendant for the plaintiff's use. At the trial of the action before SEDGWICK, J., at the last April term in this county, the plaintiff offered to prove, in support of his said count, that, in consideration of the deed made by Abigail Fowler, the defendant's wife, as the attorney of her husband, and in her own right (which deed is described in the case of Fowler v. Shearer, *ante,* page 14), of certain premises, which the husband and wife held in her right; he, the plaintiff, paid to the defendant one hundred and sixty dollars, and gave his promissory note for two hundred dollars, to recover back which money so paid was the purpose of this count. The evidence was rejected by the judge, and for that cause the plaintiff moved for a new trial, and the action stood continued upon that motion to the present term.

CURIA.—The principles of law, applicable to this case, seem to

be well settled. Whenever money is paid in consideration of a contract, which contract is void, for want of power in one of the parties, or for any cause other than fraud or illegality in the contract, natural justice dictates that the money so paid shall be refunded; and there is no principle of law to prevent the operation of so equitable a rule. Here the deed, for which the money demanded in this action was part of the consideration, has been adjudged void;[1] and in that action a promissory note, which was another part of the consideration of the same deed, has been avoided as *nudum pactum*, because the deed failed. No cause can be assigned why the money, which was actually paid, should remain in the hands of the party, who still holds the property for which this money was paid. The evidence ought, therefore, to have been admitted. The verdict must be set aside, and a new trial granted.[2]

NATIONAL GRANITE BANK v. TYNDALE, ADMINISTRATOR.

SAME v. SAME.

176 MASS. 547.—1900.

MORTON, J.—These two cases were argued together. The first is an action at law, and was before this court on the defendant's exceptions in 173 Mass. 517, 53 N. E. 1004, and it was there held that, the maker of the notes being a married woman, and the notes being made payable to the order of her husband, and indorsed by him, no action could be maintained on them against her. It comes before us now on exceptions by the plaintiff to a ruling by the presiding justice that upon the plaintiff's offer of proof an action could not be maintained against the administrator on the common counts for money lent, or for money had and received, and to a ruling that the plaintiff was not entitled to avail itself of the facts set up in the bill in equity in answer to the defense that the notes were void because made payable to the husband of defendant's intestate. The plaintiff offered to show that on December 29, 1891, it lent the defendant's intestate $15,000, and that at the same time the defendant's intestate gave the plaintiff three promissory notes for $15,000, payable to the order of her husband, and indorsed by him and by two other parties; that subsequently the defendant's intestate repudiated the notes on the ground that, having been made payable to her husband, and indorsed by him, they were void; and that the plaintiff had expressly refused to make the loan to the other

[1] In Fowler v. Shearer, 7 Mass. 14, 19, because it was the deed of a married woman.

[2] But in Edwards v. Stacy, 113 Tenn. 257 (1904), a married woman, who repudiated a contract to purchase land, was denied recovery of payments made by her.

parties, or on their individual credit, and made the loan only to defendant's intestate, and on her credit.

We think that the ruling was erroneous. The offer was to show that the loan was made to defendant's intestate, and on her credit. This was consistent with the form of the note, of which she was the maker, and of which the other parties were, as between them and the bank the indorsers. Lewis v. Monahan, 173 Mass. 122, 53 N. E. 150. The fact that the note was declared void as to her did not destroy the original transaction, or avoid the debt created by the loan to her. Walker v. Mayo, 143 Mass. 42, 8 N. E. 873; Sutton v. Toomer, 7 Barn. & C. 416.

If the other parties to the note had been co-makers with her, and the loan had been made to all of them, and the note had afterward been avoided by one of them, there would seem to be no doubt that the payee could have maintained an action against all of them for money had and received, or money lent. Leonard v. Society, 2 Cush. 462. In such a case, the note having been received on the faith that it was the valid note of all, the payee "would be warranted in treating it as a nullity, and resorting to the original contract." Leonard v. Society, *supra*. *A fortiori*, ought that to be the case when the liability of the other parties is, as here, collateral, and the action is brought against the maker alone. It is true that the plaintiff could have treated the note as valid as against the other parties, and that, if the plaintiff had sued and recovered against the last indorser, for instance, the husband might have been estopped in an action against him by a subsequent indorser to deny the validity of the note. Roby v. Phelan, 118 Mass. 541. But this action is not against the indorsers, and the counts that we are considering are not upon the note. The only use of the note which the plaintiff can make in relying on those counts is as evidence tending to show the terms on which the loan was made to defendant's intestate. It cannot recover upon the note and the common counts both, and, so far as it relies upon the common counts, it must be taken to rely upon the original contract with the maker of the note, and therefore to have elected to treat the note as a nullity. In such a case the plaintiff would have no ground of recovery against parties whose only liability as between them and the bank is that of indorsers on the note.

The plaintiff contends, however, that it is entitled to be relieved in equity against the defense that the notes are void because made payable by the defendant's intestate to her husband. Its contention is, in substance, that the defendant's intestate, having received and kept the proceeds of the notes, is estopped in equity to deny their validity. But a party cannot be relieved in equity, we think, by reason of an estoppel any more than at law, from the effect of a positive rule of law. It is the rule of law that controls the conduct of parties, not the conduct of parties the rule of law. To hold otherwise would be to permit parties to set aside at their pleasure, with the aid of a court of equity, the rule of the common law which has

been declared and recognized by the legislature and by this court that contracts between husband and wife are void. It is true that under some circumstances—as, for instance, in the case of trusts and contracts made in contemplation of marriage—contracts between husband and wife have been enforced in equity. See Frankel v. Frankel, 173 Mass. 214, 53 N. E. 398. But in this commonwealth, whatever may be the rule elsewhere, it never has been held that validity could be given to contracts between husband and wife, or in the analogous case of contracts made during minority, by means of the doctrine of equitable estoppel. See Fowle v. Torrey, 135 Mass. 87; Baker v. Stone, 136 Mass. 405; Woodward v. Spurr, 141 Mass. 283, 6 N. E. 521; Clark v. Patterson, 158 Mass. 388, 33 N. E. 589.

Moreover, there is no allegation in the bill of any conduct or representation, fraudulent or otherwise, on the part of defendant's intestate, whereby the plaintiff was induced to take the notes and part with its money to her, and thus the very foundation of an estoppel, equitable or otherwise, fails. It is consistent with the allegations in the bill that the plaintiff knew that defendant's intestate was the wife of the payee, and acted in regard to the transaction on its own knowledge. It is manifest that the fact that the notes are void does not of itself entitle the plaintiff to relief. Equity does not undertake to afford relief in all cases where contracts are for any reason void in the form in which they have been entered into.

The result is that in the action at law we think the exceptions should be sustained, and that in the bill in equity the decree sustaining the demurrer and dismissing the bill with costs should be affirmed. So ordered.[1]

SMOUT v. ILBERY.

10 Mees. & W. (Exch.) 1.—1842.

Debt for goods sold and delivered and on an account stated.

Alderson, B.—This case was argued at the sittings after last Hilary term, before my Brothers Gurney, Rolfe, and myself. The facts were shortly these. The defendant was the widow of a Mr. Ilbery, who died abroad; and the plaintiff, during the husband's lifetime, had supplied, and after his death had continued to supply,

[1] In Kneil v. Egleston, 140 Mass. 202 (1885), a wife had lent money to her husband. Plaintiff, the administratrix of the wife brought contract against the administrator of the husband in two counts,—one for money lent and one for money had and received. Recovery was denied on both counts; on the first, because of the lack of capacity of the wife to make a contract; on the second because, in the words of the court, "the inference that if one contract was repudiated another must be inferred could not arise where parties were not competent to make any contract." See the criticism of Kneil v. Egleston in Keener on Quasi-Contracts, 336-340. Recovery also denied in Muller v. Witte, 78 Conn 495 (1906).

goods for the use of the family in England. The husband left England for China in March, 1839, and died on the 14th day of October, in that year. The news of his death first arrived in England on the 13th day of March, 1840; and the only question now remaining for the decision of the court is, whether the defendant was liable for the goods supplied after her husband's death, and before it was possible that the knowledge of that fact could be communicated to her. There was no doubt that such knowledge was communicated to her as soon as it was possible; and that the defendant had paid into court sufficient to cover all the goods supplied to the family by the plaintiff subsequently to the 13th of March, 1840. * * * *

No one is liable upon the contract so made. Our judgment, on the present occasion, is founded on general principles applicable to all agents;[1] but we think it right also to advert to the circumstance, that this is the case of a married woman, whose situation as a contracting party is of a peculiar nature. A person who contracts with an ordinary agent contracts with one capable of contracting in his own name; but he who contracts with a married woman knows that she is in general incapable of making any contract by which she is personally bound. The contract, therefore, made with the husband by her instrumentality, may be considered as equivalent to one made by the husband exclusively of the agent. Now, if a contract were made on the terms, that the agent, having a determinable authority, bound his principal, but expressly stipulated that he should not be personally liable himself, it seems quite reasonable that, in the absence of all *mala fides* on the part of the agent, no responsibility should rest upon him; and, as it appears to us, a married woman, situated as the defendant was in this case, may fairly be considered as an agent so stipulating for herself; and on this limited ground, therefore, we think she would not be liable under such circumstances as these.[2] * * * *

---

iv. *Corporations.*

I. PRIVATE CORPORATIONS.

BRUNSWICK GAS LIGHT CO. v. UNITED GAS CO.

85 ME. 532.—1893.

WALTON, J.—* * * * In the present case, the Brunswick Gas Light Company undertook to lease all its property, and all its corporate rights and privileges, to the United Gas, Fuel & Light Company for twenty-five years. The latter company took possession of the works, and held them for seventeen and one-half months, making improvements upon them, and paying a portion of the agreed rent. It then abandoned the works, and possession was resumed by the lessors.

[1] Disapproved in Yonge v. Toynbee, [1910] 1 K. B. 215, 233, holding agent liable.

[2] This "limited ground" of the decision is not disapproved in Yonge v. Toynbee, supra, (p. 235).

This is a suit by the lessors against the lessees for a breach of the covenants contained in the lease. It was contended in defense that the lease was illegal and void, and that no recovery could be had upon it. The presiding justice ruled, as a matter of law, that the plaintiff company and the defendant company had power to execute the lease, and that a recovery could be had for a breach of the covenants contained in it. We think the ruling was erroneous. No legislative authority for making the lease was shown, and, without such authority, we think the lease must be regarded as *ultra vires*, and void. The authorities bearing upon the question are not in entire harmony, but the weight of authority seems to us to be overwhelmingly in favor of this conclusion. See 2 Beach Corp., §§ 831-856, inclusive, and the six pages of authorities pro and con cited under the section last cited. The cases are too numerous for citation here, and the few cases to which we have referred will furnish a key to all of them.

But it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that, while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void, and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray in a recent case in the United States Supreme Court. He said that a contract made by a corporation which is unlawful and void because beyond the scope of its corporate powers does not, by being carried into execution, become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract, and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 9 Sup. Ct. Rep. 770. We think this is the correct rule. 2 Beach Corp., § 423, and cases there cited.

Exceptions sustained.

PETERS, C. J., and EMERY, FOSTER, and HASKELL, JJ., concurred.[1]

[1] Accord, Slater Woollen Co. v. Lamb, 143 Mass. 420 (1887); Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24 (1890); Pullman's Car Co. v. Central Transportation Co., 171 U. S. 138 (1898). For a critical discussion of the doctrine of these United States Supreme Court cases, see "Rights under unauthorized corporate contracts," by George Wharton Pepper, 8 Yale Law Journ., 24-32. He concludes: "It is submitted that we shall never see our

SINCLAIR v. BROUGHAM.

[1914] A. C. 398.

A building society formed in 1851 under the Building Societies Act, 1836, and empowered by its rules to borrow to an unlimited extent, started and developed a banking business. In 1911 the society was ordered to be wound up and questions of priority arose between the outside creditors, the unadvanced shareholders, and the bank customers on current and deposit account (for convenience called the depositors). The assets were insufficient for payment of all the claimants in full but were more than sufficient for payment of the outside creditors (who were subsequently paid by arrangement) and the shareholders. The carrying on of the banking business was ultra vires.[1] The questions are in substance how the liquidator is to dispose of the mass of assets in his hands.

commercial law in a satisfactory state until the courts re-establish the common-law doctrine of general capacities. [For a vindication of the doctrine of general capacities as being the doctrine of the common law, see Pollock on Contracts, Appendix, Note D., "Limits of Corporate Power"] treating contracts made beyond the limits of chartered activity as contracts prohibited but not void—and leaving the state to punish the disregard of the prohibition while enforcing the contract between the parties. The enforcement of corporate contracts in spite of objections as to corporate power represents the overwhelming tendency of American decisions. The supreme court has given the contrary doctrine a fair trial and the result is, from the practical point of view, a failure. As between the federal courts and a majority of the state courts the advantage is with the former as respects logic, and with the latter as respects commercial convenience. The law must, of course, be logical. But shall we sacrifice commercial convenience to logic—or reform our premises so that logic and convenience may coincide?"

For an application of the doctrine of "corporate capacities," see Bath Gas Light Co. v. Claffy, 151 N. Y. 24 (1896), an action brought against a surety to recover *rent* in an *ultra vires* lease, the court says: "The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the state. The parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested that it did not, during its occupation, discharge all the obligations to the public which rested upon the plaintiff. The state has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant. Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts; and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust." That recovery may be had against a surety upon an unenforceable ultra vires contract is held in Yorkshire Co. v. Maclure, 19 Ch. D. 478 (1881).

[1] This statement is taken from the headnote.—Ed.

VISCOUNT HALDANE, L. C.—* * * * It is contended for the appellants [depositors] that they are entitled to succeed in recovering their deposits either on the footing of being money had and received by the society to their use, or as being money which never truly formed part of the assets, and which can now be followed in the hands of the society's agents and the liquidator.

I propose to consider in the first place the question whether an action for money had and received would have lain against the society on the footing that although its conduct in receiving the depositors' money was ultra vires, it had become improperly, as between itself and the depositors, enriched thereby, so that the amount received was money held to the depositors' use and recoverable as a debt, independently of any right to trace and follow. Two authorities were cited in support of the argument that such an action could have been brought successfully. One of these was a judgment of Sir William Page Wood, V.-C., in the case of the Phoenix Life Assurance Co., 2 J. & H. 441. The other was a decision of the Court of Appeal in Ireland which followed his judgment in Flood v. Irish Provident Assurance Co., 46 Ir. L. T. 214; [1912] 2 Ch. 597n. In these cases the principle of tracing was not relied on, but it was apparently held that the amount of certain premiums which had been paid in respect of policies, the issue of which was ultra vires, could be recovered as money had and received.

My Lords, if these decisions had related to the recovery of borrowed money I should find it difficult to reconcile them with principle. If it be outside the power of a statutory society to enter into the relation of debtor and creditor in a particular transaction, the only possible remedy for the person who has paid the money would on principle appear to be one in rem and not in personam, a claim to follow and recover specifically any money which could be earmarked as never having ceased to be his property. To hold that a remedy will lie in personam against a statutory society, which by hypothesis cannot in the case in question have become a debtor or entered into any contract for repayment, is to strike at the root of the doctrine of ultra vires as established in the jurisprudence of this country. That doctrine belongs to substantive law and is the outcome of statute, and cannot be made different by any choice of form in procedure.

It is, therefore, binding both at law and in equity. In the jurisprudence of England the doctrine of ultra vires must now be treated as established in a stringent form by Acts of the Legislature and decision of great authority which have interpreted these Acts. This is a principle which it appears to me must to-day be taken as a governing one, not only at law but in equity. I think it excludes from the law of England any claim in personam based even on the circumstance that the defendant has been improperly enriched at the expense of the plaintiff by a transaction which is ultra vires. All analogies drawn from other systems, such as that of the Roman law,

appear to me to be qualified in their application by two considerations. The first is that, broadly speaking, so far as proceedings in personam are concerned, the common law of England really recognizes (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising quasi ex contractu it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed. This is a point to which I shall have to return later on in what I have to say. The second consideration is that where an Act of Parliament imposes a restriction on capacity, that restriction is binding in equity as much as at law, the principles of which equity follows.

Nor does the difficulty of extending the scope of the judgments of Sir William Page Wood and the Irish Court of Appeal to cases of borrowing appear less when the foundation of the action for money had and received is investigated. Consideration of the authorities has led me to the conclusion that the action was in principle one which rested on a promise to pay, either actual or imputed by law. Moses v. Macferlan, 2 Burr. 1005, is the leading case on this point. It was an action on the case for money had and received under circumstances where any notion of an actual contract was excluded. But Lord Mansfield explained how in such circumstances the law treated the defendant as being in the same position as if he had incurred a debt: "If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded on the equity of the plaintiff's case, as it were upon a contract."

The claim in Moses v. Macferlan, 2 Burr. 1005, was one of assumpsit in the form of the common indebitatus assumpsit count. This was a form of claim which had been very gradually evolved. The researches of recent writers appear to me to have placed its origin in its true light. The basis of actions of this kind was originally tort, a writ having been framed in consimili casu under the provisions of ch. 24 of the Statute of Westminster (13 Edw. I). By degrees, out of this action on the case and as one of its forms, a new form which was soon to diverge wholly from tort, the action of assumpsit, arose. In Slade's Case, 1602, 4 Rep. 92b, the judges resolved that "every contract executory imports in itself an assumpsit," with the result that it became no longer necessary or desirable to use as the remedy where money was due the action of debt, which was embarrassing because it let in the right to a "wager of law." Then came the extension of indebitatus assumpsit to cases in which it was clear that no express promise could be proved. For, as Lord Mansfield points out, the law is ready to imply a debt in such cases arising quasi ex contractu. The promise to pay which created the right of action might have been a pure fiction of law. In many cases no such promise could possibly have been established. Yet it took some time before the judges brought themselves to go so far. Starke

v. Cheesman, 1699, 1 Ld. Raym. 538, was a claim on a bill of exchange by the holder against the drawer on the allegation that the drawee had refused to accept. It was held that an actual promise must be implied. But what is remarkable is the language of the judgment in which the declaration, which contained an indebitatus assumpsit count, was held good. Holt, C. J., is reported to have said "that the notion of promises in law was a metaphysical[1] notion, for the law makes no promise, but where there is a promise of the party." Yet, the observation of Holt, C. J., notwithstanding, a little later on this "metaphysical notion" became firmly established. For it was just the fiction of attributing a promise in a multitude of cases where in reality there was none which finally gave the action its comprehensive range, and made it available even where no fact importing or implying privity of contract could be proved. The history of the action of assumpsit has been described by a writer to whom lawyers and historians alike owe much, the late Professor Ames of Harvard University, in language which shows how easily the fiction of a promise grew into part of the law. Speaking of the action of assumpsit generally he says: "In its origin an action of tort, it was soon transformed into an action of contract, becoming afterward a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterward supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment." Lectures on Legal History, p. 166.

My Lords, notwithstanding the wide scope of the remedy so described, I think that it must be taken to have been given only, as I have already said, where the law could consistently impute to the defendant at least the fiction of a promise. And it appears to me that as matter of principle the law of England cannot now, consistently with the interpretation which the Courts have placed on the statutes which determine the capacity of statutory societies, impute the fiction of such a promise where it would have been ultra vires to

[1] I. e. fanciful, as certain poets, about the same time and later, were classed as "metaphysical."—F. P.

give it.[1] The fiction becomes, in other words, inapplicable where substantive law, as distinguished from that of procedure, makes the defendant incapable of undertaking contractual liability. For to impute a fictitious promise is simply to presume the existence of a state of facts, and the presumption can give rise to no higher right than would result if the facts were actual.

I am accordingly of opinion that while the decisions of Sir William Page Wood and of the Irish Court of Appeal to which I have referred may possibly, notwithstanding that the issue of the policies was ultra vires, be supported on the ground that they related merely to the failure of consideration for the premiums paid (a question on which it is unnecessary for me to express any opinion), they cannot be invoked as authorities for the proposition that an action for money had and received would have lain in a case of borrowing ultra vires.

It follows that the depositors in the present case will not succeed unless they are able to trace their money into the hands of the society or its agents as actually existing assets. The question is whether they are able to establish enough to succeed upon this footing. Their claim cannot be in personam and must be in rem, a claim to follow and recover property with which, in equity at all events, they had never really parted.

I proceed therefore, to consider the case on this restricted footing. * * * *

2. MUNICIPAL CORPORATIONS.

McDONALD v. MAYOR, ETC., OF NEW YORK.

68 N. Y. 23.—1876.

Appeal from order of the general term of the supreme court in the first judicial department reversing a judgment in favor of plaintiff entered upon a verdict, and granting a new trial.

Folger, J.—The plaintiff sues to recover from the city the value of materials furnished by him to certain officials, which were used in the repair of a public way. The amount he claims is over $1,600 in the whole. The materials were furnished at different times, in parcels, each of which, except one, was less in value than $250.

He does not aver, nor did he prove in terms, that a necessity for the purchase or use of the materials was certified to by the head of the department of public works, or that the expenditure therefor was authorized by the common council (Laws of 1857, vol. 1, p. 886,

[1] Upon this point all the judges agreed.

chap. 446, sec. 38); nor did he aver or prove in terms that a contract for the purchase of the materials was entered into by the appropriate head of department, upon sealed bids or proposals, made in compliance with public notice advertised. (Id.) The existence and stringency of these statutory provisions are recognized by plaintiff's counsel, but the force of them is sought to be avoided. It is urged that the object of the expenditure was proper, as it is part of the defendant's corporate duty to keep public ways in repair; that the material was delivered to the superintendent of roads, and official of the defendant, charged with carrying that duty into practical effect; and that the plaintiff had reason to believe that the superintendent was acting within the line of his duties. The first two of these propositions may be admitted; the third may not be. Doubtless, to the apprehension of the plaintiff, the superintendent was so acting, as to do work which it was the duty of defendant to cause to be done. But we see nothing in the case which brought to his mind, so as to create a belief, that there had been a contract made for the material, as above indicated, or that the necessity for the expenditure had been certified to and authorized, as required by law. And though the superintendent of roads had certified to be correct, the bills for the materials, rendered by the plaintiff, this did not meet the letter of the statute laws. Such certification did not precede the reception of the material; nor was the certification by the head of the department; nor was the taking and use of the material, nor payment for it, authorized by the common council. Nor can it be that the provisions of the statute are alone for the instruction of the department and officials of the defendant. They were a restraint upon them, but upon other persons as well. They put upon all who would deal with the city, the need of first looking for the authority of the agent with whom they bargain. Quite clearly do they impose upon the paying agent of the defendant a prohibition against an unauthorized expenditure. And are they not also a restraint upon the municipality itself? They are fitted to insure official care and deliberation, and to hold the agents of the public to personal responsibility for expenditure; and they are a limit upon the .powers of the corporation, inasmuch as they prescribe an exact mode for the exercise of the power of expenditure.

It is said that the plaintiff had a right to presume that the agents of the defendant transacted their business properly, and under sufficient authority. Does not this involve, also, that the plaintiff had a right to presume that it was the business of the superintendent of roads to purchase material for the city upon the credit of the city, and that he had authority so to do? This cannot be maintained. It is fundamental, that those seeking to deal with a municipal corporation through its officials must take great care to learn the nature and extent of their power and authority. Hodges v. Buffalo, 2 Denio 110; cited 33 N. Y. 293; Cornell v. Guilford, 1 Den. 510; Savings Bank v. Winchester, 8 Allen 109. The plaintiff cites United States Bank v. Dandridge, 12 Wheat. 70. But there

it is said that if the charter imposes restrictions they must be obeyed. Could the plaintiff presume that it was the duty of the defendant to keep the Kingsbridge road in repair? No; he must look to its charter to learn of that duty. The same instrument would show him just how it must obtain the material to perform that duty. The Gas Company v. San Francisco (9 Cal. 453) is also cited. The real question there decided was, that a city can be held to have incurred a liability otherwise than by ordinance. There was no stress in that case upon any inhibitions in the charter of the city. The result was arrived at by a divided court.

But the main reliance of the plaintiff is upon the proposition that the defendant, having appropriated the materials of the plaintiff and used them, is bound to deal justly and to pay him the value of them. The case of Nelson v. The Mayor (63 N. Y. 535) is cited. The learned judge who delivered the opinion in that case does, indeed, use language which approaches the plaintiff's proposition; but the judgment in that case did not go upon the doctrine there put forth; and when the opinion is scrutinized it does not quite cover this case. It is said: "If it (the city) obtains property under a void contract, and actually uses the property, and *collects the value of it from property owners by means of assessments,* the plainest principles of justice require that it should make compensation, for the value of such property, to the person from whom it was obtained." The words we have marked in italics indicate a difference between the two propositions; though it is to be admitted, not a great difference in the principles upon which each rests. The case in the California courts (Argenti v. San Francisco, 16 Cal. 255), goes upon the ground set forth in the opinion in Nelson's case *supra.* There is, however, a more radical difference than that above noted in the two cases cited and that in hand. In those two cases the way was open for implying a promise to pay what the property was worth, if, with no disregard of statute law, such an implication was admissible; that is to say, there was in those cases, so far as appears from the facts, no express inhibition upon the city that it should not incur a liability save by an express contract. Here there is an express legislative inhibition upon the city, that it may not incur liability unless by writing and by record. How can it be said that a municipality is liable upon an implied promise, when the very statute which continues its corporate life, and gives it its powers, and prescribes the mode of the exercise of them, says, that it shall not, and hence cannot become liable, save by express promise? Can a promise be implied, which the statute of frauds says must be in writing to be valid? How do the cases differ? The Bank of the United States v. Dandridge, *supra,* which is a leading case upon the doctrine of the liability of a corporation aggregate, upon a promise implied, holds, as we have already said, that if the charter imposes restrictions upon the manner of contracting, they must

be observed. And the California cases above cited concede the same. It is plain that if the restriction put upon municipalities by the legislature, for the purposes of reducing and limiting the incurring of debt and the expenditure of the public money, may be removed, upon the doctrine now contended for, there is no legislative remedy for the evils of municipal government, which of late have excited so much attention and painful foreboding. Restrictions and inhibition by statute are practically of no avail, if they can be brought to naught by the unauthorized action of every official of lowest degree, acquiesced in, or not repudiated by his superiors. Donovan v. The Mayor (33 N. Y. 291), seems to be an authority in point, though the exact question now presented was not considered. And incidental remarks of DENIO, J., in Peterson v. The Mayor (17 N. Y. 449), are to the same purport. And see Peck v. Burr (10 N. Y. 294). The views here set forth are not to be extended beyond the facts of the case. It may be that where a municipality has come into the possession of the money or the property of a person, without his voluntary intentional action concurring therein, the law will fix a liability and imply a promise to repay or return it. Thus, money paid by mistake, money collected for an illegal tax or assessment; property taken and used by an official, as that of the city, when not so:—in such cases, it may be that the statute will not act as an inhibition. The statute may not be carried further than its intention, certainly not further than its letter. Its purpose is to forbid and prevent the making of contracts by unauthorized official agents for supplies for the use of the corporation. This opinion goes no further than to hold that where a person makes a contract with the city of New York for supplies to it, without the requirements of the charter being observed, he may not recover the value thereof upon an implied liability. The judgment should be affirmed. All concur. Judgment affirmed.[1]

[1] In Dickinson v. City of Poughkeepsie, 75 N. Y. 65, 75 (1878), the court says: "With regard to the first ground of recovery upon a *quantum meruit* the point seems to be settled adversely to the plaintiffs by authority. The cases generally hold that there can be no recovery against a municipality for services performed upon a contract void for want of power to make it, although performed upon the property of the municipality, and of which they have the benefit. As was said in Burrill v. Boston (2 Clifford 590), there can be no implied promise to pay upon a *quantum meruit*, where there is no power to contract, either expressly or impliedly, except upon a written contract with the lowest bidder after advertisement. See Bonesteel v. New York, 22 N. Y. 162; Brady v. New York, 20 N. Y. 312; Hodges v. Buffalo, 2 Den. 110; McDonald v. New York, 68 N. Y. 23." But in Ward v. Kropf, 207 N. Y. 467 (1913), it was held that where a contract with a village for construction of a sewer was ultra vires and therefore the contractor could not recover for the part completed, yet if the village subsequently completed the job, and utilized the work and materials of the former contractor, it is under an implied obligation to pay for them, though by abandoning his work it would have avoided any obligation.

ALLEN v. INTENDANT AND COUNCILMEN OF LA FAYETTE.

89 ALA. 641.—1889.

McCLELLAN, J.—The intendant and councilmen of the town of La Fayette on or soon after March 18, 1889, purchased from one Schuessler a brick college building and grounds, situate in La Fayette, and took a quitclaim deed to the property to themselves, the said intendant and councilmen. Only a small part of the purchase money was paid out of the funds of the town, and the balance, about $1,300, was borrowed from Mrs. S. A. Frederick by the town authorities, and paid to Schuessler. For the repayment of this loan warrants were regularly drawn against the treasury of the town for the sums of $659.40, payable January 1, 1890, and $667.72, payable March 1, 1890, respectively, and delivered to Mrs. Frederick. The present bill is exhibited by resident property owners and tax-payers of the town of La Fayette, and seeks to enjoin the payment of said warrants on the grounds (1) that the municipality of La Fayette was without authority to purchase the schoolhouse or college building, and that the money was loaned by Mrs. Frederick with full knowledge that it was to be used in that behalf, and warrants taken by her with full knowledge that it had been so applied; and (2) that the intendant and councilmen of the town of La Fayette had no power under its charter to *borrow money* for any purpose. [*Then follows a discussion as to the authority of the defendants.*]

The intendant and councilmen of La Fayette had no authority, therefore, to borrow this money, nor had they any authority to draw the warrants which were drawn and delivered to Mrs. Frederick. They were the trustees for the inhabitants of the town. Their action in excess of the power with which the trust relation clothed them, and in violation of the duties they owed to their *cestui que trustent,* the present complainants, among others, was of no manner of efficacy in fixing a liability on those for whom they thus usurped the power of acting. The warrants in the hands of Mrs. Frederick are as if they were not, and had never been. Neither the municipality of La Fayette, nor any of its officers or agents, is under any obligation, legal, equitable, or moral, to pay those *warrants,* or to fulfill the *contract* out of which they sprung. But back of that contract, and back of those warrants, there is, on the facts presented by the bill and accentuated by the answers, not only a moral but a legal liability resting on the municipality of La Fayette, and on its officers, *to repay the money which came from Mrs. Frederick, and has been used by the corporation for authorized corporate purposes.* In other words, the town of La Fayette is liable as upon an implied *assumpsit,* not under, but wholly apart from, the unauthorized contract, and not for the amount its officers *borrowed* from Mrs. Frederick, but for the amount of her money which they *re-*

ceived and applied to the purchase of a house which the charter authorized them to buy and the town to hold, which was reasonably necessary to the exercise and performance of expressly granted and imposed functions and duties, and which the use of her funds had enabled the corporation to acquire and devote to its legitimate purposes.

The authorities are not uniform to this proposition. It is however believed to be eminently sound in principle, and has the support of some of the most distinguished law writers and of courts of marked ability and learning. It is thus formulated by Mr. Brice with general reference to both public and private corporations: "Persons who have in any way advanced money to a corporation, which money has been devoted to the necessaries of the corporation, are considered in chancery [and, also, it would seem to follow, in the equitable action for money had and received at law] as creditors of the corporation to the extent the loan has been expended," and, in support of the doctrine thus stated, he cites many cases in which corporations without any authority, expressed or implied, to that end had borrowed money, and been holden, although the contract itself was wholly void, to account for so much of it as had been expended in furthering the legitimate objects of the concern. Green's Brice, Ultra Vires, 724 *et seq.* And in this connection the American editor of the work cited observes: "In the United States the defense of *ultra vires,* interposed against a contract wholly or in part executed, has very generally been looked upon with disfavor. The result has been that in some cases a liberal construction has been applied so as to destroy the foundation of the defense; in others, the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases the doctrine of estoppel *in pais* has been applied to exclude the defense." And many American cases are cited which support one or the other of the positions stated as being taken by the courts of this country in respect to private corporations.

In regard to municipal corporations, the opinion of Judge Dillon manifestly is in line with the position we have taken. We believe this to be a correct formulation of his views of the law on the point under consideration, as gathered from his inestimable work on Municipal Corporations. That municipal corporations are liable to actions of implied *assumpsit* with respect to money or property received by them and applied beneficially to their authorized objects through contracts which are simply *unauthorized,* as distinguished from contracts which are *prohibited* by their charters, or some other law bearing upon them, or are *malum in se,* or violative of public policy. 1 Dill. Mun. Corp., §§ 126, 132, 133, 459-465; 2 Dill. Mun. Corp., §§ 935, 937, 938. Thus in a note to section 126 it is said: "If money is improperly borrowed in advance of liabilities actually created, and reaches the municipal treasury, and is expended by direction of the governing body for authorized municipal objects,

the municipality may then * * * be liable in a proper action or suit; but the action should be, we think, for money had and received, or by suit in equity, and not upon the invalid bonds." And under section 935 it is said that, "where the corporation receives and retains the consideration of an *ultra vires* contract, it may be liable upon an implied *assumpsit* in respect to such consideration." And the opinion of Chief Justice FIELD in a case where the subject underwent very thorough examination is quoted approvingly to the effect that "the doctrine of implied municipal liability applies to cases where money or property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner from the like general obligation; the law, which always intends justice, implies a promise." Argenti v. San Francisco, 16 Cal. 255.

Justice MILLER, speaking of cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires,* observes: "But even in this class of cases, the courts have gone a long way to enable parties who have parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money, specifically, or as money had and received to plaintiff's use." Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. Rep. 1055. To a like effect are the following cases: Pimental v. San Francisco, 21 Cal. 362; Clark v. Saline Co., 9 Neb. 516, 4 N. W. Rep. 246; Marsh v. Fulton Co., 10 Wall. 676; Louisiana v. Wood, 102 U. S. 294; Chapman v. County of Douglas, 107 U. S. 348, 2 Sup. Ct. Rep. 62.

The case of Read v. Plattsmouth, 107 U. S. 568, 2 Sup. Ct. Rep. 208, involved the constitutionality of a statute of Nebraska which undertook to impart legality and vitality to certain previously issued bonds of the city of Plattsmouth, upon which money had been raised by the city, and applied to the acquisition of a lot, and the building thereon of a schoolhouse, but which were void for the lack of charter power to issue them. The question of the constitutionality of the statute turned upon a consideration of whether, granting the utter invalidity of the bonds as such, the city was nevertheless not bound for the money thus received and used for corporate purposes; and to this point Justice MATTHEWS delivered the opinion of the supreme court of the United States as follows: "In the present case, the statute does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess of $15,000, were void because unauthorized, the city of

Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a schoolhouse on property, the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept, and used, immediately arose. This obligation, according to general principles of law accepted in Nebraska, was capable of judicial enforcement."

The case of Gause v. City of Clarksville involved the power of a municipality, invested with the ordinary corporate powers, to borrow money. The power was denied, and the bonds on which the money was borrowed were held to be void. After announcing this conclusion, DILLON, circuit judge, proceeds: "It will not validate these bonds so as to make them the basis of a recovery even if it be shown that the money borrowed was in each instance used for the purpose for which they are recited in the deed to have been borrowed. But the plaintiff may amend and add in respect to these bonds counts in the nature of counts for money had and received. Adhering to the decisions of this court,—TREAT, J., in Wood v. Louisiana, [affirmed on appeal, and reported in 102 U. S. 294,]—the present holder of the bonds will then be treated as the assignee of the original holder or payee, in respect of the money actually lent to the city; and, if after the city obtained it, the same was in fact expended for the erection and repair of wharves, or the improvement of the streets, or possibly if expended for other authorized municipal purposes under the authority of the city council, the amount advanced with lawful interest, less payments thereon, may be recovered." Gause v. Clarksville, 5 Dill. 180. [*Then follows a review of the following Alabama cases:* Simpson v. Lauderdale Co., 56 Ala. 64; Wetumpka v. Wharf Co., 63 Ala. 611; Montgomery v. Co., 31 Ala. 76; Grand Lodge v. Waddill, 36 Ala. 313; Eufaula v. McNab, 67 Ala. 588; Railroad Co. v. Dunn, 51 Ala. 128.]

So much for the adjudications of this court. We repeat that nothing decided in them is opposed to the view we have taken. There are some cases in other states which assert the contrary doctrine. One of them is Hackettstown v. Swackhamer, 37 N. J. Law 191, decided by the supreme court of New Jersey, which ranks among the ablest in the country. The opinion denies a right of recovery for money had and received and appropriated to corporate purposes, when it has been obtained on an *ultra vires* borrowing contract; BEASLEY, C. J., intimating that the only remedy, if any, was in equity, to be subrogated to the claims of creditors whose debts had been paid with the borrowed money. Judge Dillon says of this proposition: "No necessity is perceived for so strict a doctrine." 1 Dill. Mun. Corp., § 126, note. No other cases are cited by counsel to this point than those we have referred to. Two or three others, tending in greater or less degree to support the view taken by the New Jersey court, have come under our observation in the somewhat exhaustive examination we have given this question, but our conclusion is that the weight of authority is in favor

of the implied liability of municipal corporations, under the facts disclosed in this record.

We cannot perceive that the doctrine is open to objection on the ground of its supposed evil tendencies and consequences. It is shorn of all perilous possibilities by the limitations which hedge it about. It cannot obtain where the charter, or other statute operating in the premises, contains a prohibition of the power to borrow money, since a promise cannot be implied in the face of express law, but only in cases where, as in this one, there is merely a defect of power. Id., § 451. It involves no danger of the municipality being charged with moneys which have been appropriated by its officers to their own use, or even to the use of the corporation, except in the manner, to the extent, and for the purposes authorized by the charter, as in either case the implication will not arise, and corporate liability will not attach. None of the evils which are justly supposed to result from the power to borrow money, which are not also attendant upon the capacity to incur debts, and which therefore have led to a denial of the former power unless expressly or by necessary intendment conferred, while the latter is admitted as incident to ordinary municipal functions, can possibly supervene where the money which has been borrowed has also been honestly devoted to expenditures for which the corporate authorities might have incurred debt. And, to declare liability in the one instance, and deny it in the other, on the ground of evils which pertain alike to both, would be an anomaly to which we cannot subscribe. Indeed, we apprehend that the power to create debts may be productive of more evils in municipal government than could, in the nature of things, result from the doctrine we are considering, when would-be lenders of money come to understand that the return of their proverbially timid capital depends not upon the contracts they make, but on the faithful application of the loan to certain specific objects, by persons over whom they have no control.

From every point of view, therefore, we feel safe in affirming that, under the case presented by the bill and answer,—there really being no dispute about the facts in this regard,—Mrs. Frederick has a valid demand against the town of La Fayette for the amount of money advanced by her, not because the corporate authorities agreed to repay it to her, but because they have legitimately used it for the benefit of the town, in a way and to an end fully authorized by its charter. The warrants she holds are not enforceable as such, yet they truly represent the amount of her claims, and in the payment of that amount the corporate authorities would do no more than equity and justice require of them. It would be an idle and useless thing, therefore, to enjoin their payment, and exercising that discretion which may always be indulged with reference to the grant or refusal of an injunction, when substantial equity does not demand the issuance of the writ, we decline to reinstate it in this case. McBryde v. Sayre, 86 Ala. 458, 5 South. Rep. 791. The decree of the chancellor dissolving the injunction is affirmed.[1]

[1]An excellent discussion is also found in Luther v. Wheeler, 73 S. Car. 83 (1905), where recovery in quasi-contract was likewise allowed.

Note in 4 Columbia Law Review, 67: * * * * The cases fall into more or less well-defined classes, but unfortunately there is a lack of harmony in every class. Still a close inspection shows a general working principle underlying the whole subject. It is this: Municipal corporations stand in particular need of protection against their officers. In order to afford this protection the legislature has usually defined minutely the powers of these officers and the manner in which the same shall be exercised. When any act of the corporation, through its officers, will, directly or indirectly, vary in kind or degree the burden thus authorized to be placed upon the members of the corporation, public policy demands that recovery in any form shall be denied. If, however, reparation will not in any manner affect the burden upon the tax-payers, the ordinary principles of quasi-contract will be applied.

The following classes embrace most of the cases that have arisen: First class—where the corporation has no power at all to make the attempted contract. This class should be subdivided as follows: (1) if reimbursement for the services or property received by the corporation would, in any manner, increase or vary the prescribed burden upon the tax-payers, there should be no recovery either in contract or quasi-contract. Agawam Nat. Bank v. South Hadley (1880), 128 Mass. 503; Litchfield v. Ballou (1884), 114 U. S. 190; *contra,* Argenti v. San Francisco (1860), 16 Cal. 256. (2) But if recovery by the plaintiff means in effect mere restitution of what the corporation has unlawfully received, recovery is allowed in quasi-contract. Dill v. Wareham (1844), 7 Metc. 438; Leonard v. City of Canton (1858), 35 Miss. 189. In such a case equity will not relieve the municipal corporation from such a contract unless it restores the property. Turner v. Cruzen (1884), 70 Ia. 202. The denial of recovery for money paid for unauthorized bonds is an exception to this rule and rightly, for repayment of the money loaned, with interest, would exactly accomplish the prohibited purpose. Thomas v. City of Richmond (1870), 12 Wall. 349; Litchfield v. Ballou, *supra.*

Second class—where the corporation is authorized to contract for a particular purpose, but only in a certain manner. This class is capable of several subdivisions. (1) If the formalities required, relate to the formation of the contract, the case is treated as if it fell within the first class, and the same tests should be applied. McDonald v. Mayor (1876), 68 N. Y. 23; Zottman v. San Francisco (1862), 20 Cal. 96. The reason given is that recovery in any manner would completely nullify the statutes which prescribe the formalities as safeguards for the municipality. But see, *contra,* Gas-Light Co. v. Memphis (1894), 93 Tenn. 612; Lincoln Land Co. v. Grant (1898), 57 Nebr. 70. (2) If the prescribed mode of payment is the only formality disregarded in the contract, recovery in quasi-contract is allowed. Hitchcock v. Galveston (1877), 96 U. S. 341; Chapman v. County of Douglass (1882), 107 U. S. 348. The reason for the distinction is that payment in the legal way will

place no more burden on the municipality than was authorized. (3) If the required formalities have not been complied with but the proper officers certify that they have, the plaintiff should recover if he were honestly misled. Louisiana v. Wood (1880), 102 U. S. 294; Pimental v. San Francisco (1863), 21 Cal. 352; Moore v. Mayor (1878), 73 N. Y. 238. (4) If some insignificant ministerial act has been omitted, recovery is not therefore denied. Carey v. East Saginaw (1889), 79 Mich. 73. There is another class of cases where the power to make the contract is given and no formalities are prescribed. If no express contract is made but benefits are conferred at request recovery may be had, but it is properly on a contract implied in fact and not in quasi-contract. Port Jervis Water Co. v. Port Jervis (1893), 71 Hun 66; Nashville v. Toney (1882), 10 Lea 643; Kramrath v. Albany (1891), 127 N. Y. 575. *Contra,* French v. Auburn (1872), 62 Me. 452.

Note in 17 Harvard Law Review, 343: By an action in quasi-contract one who does work under a contract supposedly valid, but actually invalid, can generally recover the value of the benefits conferred by his services. Van Deusen v. Blum, 18 Pick. (Mass.) 229. Where, however, services are so rendered for a municipal corporation other considerations become important. Often there are statutes expressly prohibiting recovery. Where there are no such statutes the question has frequently arisen and the cases have been divided into two classes: first, where the services are rendered under a contract *ultra vires* in its nature; second, where the services are rendered under a contract void because of noncompliance with some technical requirement either of the general law or the corporation's charter. A third class is suggested by a recent case in which recovery was allowed for services rendered under a contract made for the corporation by an agent who had no authority. City of Chicago v. McKechney, 68 N. E. Rep. 954 [205 Ill. 372 (1903)].

In the first class of cases, services performed under an *ultra vires* contract, recovery in quasi-contract is allowed only where it will impose no burden on the tax-payers; where in effect recovery is merely to return what the corporation has received. For example, recovery was allowed of money paid to a town on a void contract for the sale of a fishery. Dill v. Inhabitants of Wareham, 7 Met. (Mass.) 438. This, it is submitted, is the correct rule. If what has been received can be returned, it must be paid for when not returned. So also if it has been applied to legitimate corporate purposes, it must be paid for. In other cases, however, there should be no liability. To allow recovery would be to allow the corporate officials to indirectly impose a burden on the tax-payers which the law has directly forbidden, and would open the door to extensive frauds on the public.

Where work is done under a contract void because of some tech-

nicality and not in its substance *ultra vires*, it seems clear that there should be a remedy in quasi-contract for the reasonable value of the benefits conferred. An individual who has procured services by means of a contract of this sort, invalid, for instance, because of noncompliance with the statute of frauds, is liable for their value in quasi-contract. Cadman v. Markle, 76 Mich. 448; Montague v. Garnett, 3 Bush (Ky.) 297. A corporation in such cases should stand in the same position as an individual. The services have been requested and received. They are services for which the corporation had a right to contract, and it is held for no more than the benefit received. A more obvious case for quasi-contract can hardly be imagined. The courts, however, in such cases are not unanimous. Recovery is generally made to turn on the nature of the technical defect. McDonald v. Mayor, etc., New York, 68 N. Y. 23.

The courts, in opposition to the principal case, have generally held that where services are performed under a contract made for the corporation by an officer who had no authority, there can be no recovery. Bonesteel v. Mayor, etc., New York, 22 N. Y. 162. It is said that to allow recovery in such cases would make possible extensive frauds on the public. Hague v. City of Philadelphia, 48 Pa. St. 527. This objection, however, seems untenable, for the proper authorities have the power to make contracts for the same purpose, and recovery is limited to the benefit conferred. There seems to be no reason for treating the corporation in such cases differently from an individual. Recovery may, however, be objectionable for other reasons. The services are not at the request of the corporation. Consequently on general principles of quasi-contracts there is no liability unless the corporation voluntarily keeps the benefits conferred. Zottman v. San Francisco, 20 Cal. 96. So, unless the corporation, having the power to return, nevertheless retains the benefit of the services, it should incur no liability in this class of cases.[1]

---

b. Statute of Frauds.

i. *Plaintiff in Default.*

THOMAS v. BROWN.

L. R. 1 Q. B. D. 714.—1876.

Interpleader issue obtained in an action brought by plaintiff against Croucher, an auctioneer, to recover a deposit.

The plaintiff signed a contract for the purchase of a leasehold shop from the "vendor," and the auctioneer signed "as agent of the vendor." The vendor's name did not appear in the contract. The plaintiff paid a deposit of £70. Subsequently plaintiff repudiated

[1] See also upon this vexed question, Woodward, Quasi-Contracts, § 161; Knowlton, "Quasi-Contractual Obligation of Municipal Corporations," 9 Mich. L. Rev. 671; Note in 1 Cornell L. Quarterly, 311.

the contract on the ground (*inter alia*) that the contract did not disclose the name of the vendor, and was therefore a memorandum insufficient to satisfy the statute of frauds.

MELLOR, J.—* * * * The two questions for our consideration are, first, whether the contract was a valid contract, and, secondly, if it was not, whether the plaintiff is, under the circumstances, entitled to recover back the deposit. I am of opinion that our judgment ought to be for the defendant. Several cases have been decided on the point now raised, particularly two cases which came before the master of the rolls: Sale v. Lambert, L. R. 18 Eq. 1, and Potter v. Duffield, L. R. 18 Eq. 4. In the first of these cases a memorandum of agreement was held to be sufficient within the statute of frauds, though the vendor was not described otherwise than as "the proprietor" of the premises, the master of the rolls saying that the term "proprietor" was an excellent description, and apparently holding that this word, with nothing else in the document to enlarge it, was quite sufficient. Now, comparing this decision with the later one, Potter v. Duffield, where the same learned judge held that the description "vendor" was insufficient, I have some difficulty in assenting to it. I think, however, that we ought to hold ourselves bound by the last of these two cases, holding that the word "vendor" is insufficient, though, as far as my judgment goes, I can see no distinction between the nature of the memorandum in either case. I think that the description which should enable us to dispense with the actual names of the parties ought to be very precise and exact, and that in neither of the cases was this requirement complied with. To allow so general a description to satisfy the statute seems to me to lead to all the mischief which it was intended to prevent, and I think that no description ought to be held sufficient except where it identifies the party without the necessity of resorting to parol evidence. However, it is unnecessary to consider whether these cases were or were not rightly decided, for I think that the defendant is entitled to our judgment on two grounds. The main object of the interpleader issue is to ascertain whether the £70 belongs to one or other of the two parties, and the case in Beavan's Reports, Casson v. Roberts, 31 Beav. 613, 32 L. J. Ch. 105, where it was held that a contract under similar circumstances could not be enforced, is, I think, distinguishable, in spite of some strong expressions of Lord ROMILLY. Here, there are two answers to the claim to have the money paid back to the vendee. First, on the face of these conditions of sale it is obvious that the plaintiff paid the deposit knowing at the time that the name of the defendant did not appear on the memorandum of agreement otherwise than as "the vendor." She voluntarily paid the £70, with full knowledge that the vendor's name was not disclosed on the contract, and so far accepted the description as sufficient. Under these circumstances, I think she cannot recover back the money.

Secondly, under the fourth condition of sale[1] "the vendor shall, within seven days from the day of sale, deliver to the purchaser or his solicitor an abstract of title to the property purchased by him, subject to the stipulations contained in the conditions. And the purchaser shall, within seven days from the delivery of the abstract, deliver to the vendor's solicitor a statement in writing of his objections and requisitions (if any) to or on the title as shown by such abstract, and upon the expiration of such last-mentioned time the title shall be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions (if any), and time shall be deemed to be as of the essence of this condition, as well in equity as at law." Now, what did the plaintiff do? If she had intended to insist on her right to rescind the contract on the ground that the memorandum was insufficient, it was her duty to send back the abstract, saying, "Why do you send this to me?" She, however, does not send it back, but keeps it, and her solicitors write this letter: "Dear Sirs,—Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next, at two o'clock, to examine abstract of title with deeds, on behalf of Mrs. Thomas."

Now I cannot conceive anything more unlikely than that a solicitor would allow his client's title-deeds to be examined while there was a doubt as to the validity of the contract of sale. But the plaintiff's solicitors proceed to examine the abstract, and learn from it the name of the vendor. Then they keep the abstract in their possession, as if the only question which could arise was as to the title, and write a letter inclosing requisitions as to the title, putting at the foot of the requisitions the words, "The above requisitions are made without prejudice to any question that may arise as to the contract for the purchase of the premises." I take the word "objection" to mean any unforeseen objection to the title which the plaintiff's solicitors did not wish to be taken to have waived. The requisitions are returned with answers, the correspondence goes on, and finally, on the 9th of July, the defendant's solicitor writes that he has been informed that the plaintiff does not intend to complete her purchase, and that if this be true he shall take proceedings. To this the plaintiff's solicitors reply repudiating the contract.

Now I feel no doubt that the case comes within the rule laid down in Cornish v. Abington, 4 H. & N. 549; 28 L. J. Ex. 262, that, "if any person by actual expressions, or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former intends that he should do so or not, the party using that language or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." I think this is an express authority which quite justifies

[1] This condition was not set out in this case, but a copy of the conditions was by consent referred to during the argument.

us in holding that it does not lie in the mouth of the vendee, who has accepted a contract like this, afterwards to object to it. For this reason I think we cannot say that the contract is invalid.

Then there is a second answer. In an action like the present, for money had and received, the plaintiff can only recover money paid without knowledge of the real facts—in ignorance of facts which, if they had been known, would have left the plaintiff an option whether she would pay or not. The rule is laid down by PATTESON, J., in Duke of Cadaval v. Collins, 4 A. & E. 858, that money paid under compulsion of law cannot be recovered back as money had and received; and, further, "where there is *bona fides* and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." It is unnecessary to allude to the difference between ignorance of the law and ignorance of the facts. Now, is there anything unconscientious in the defendant keeping this money? I can see nothing. The breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the statute of frauds, and to say, "Although I can have the contract performed if I please, I repudiate it." Under these circumstances, I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim.

QUAIN, J.—I am of the same opinion. I do not propose to discuss the cases which have been cited; I will merely say that I have great difficulty in reconciling the two decisions of the master of the rolls. But I decide this cause on the ground that it is an action by an unwilling vendee against a willing vendor, and that it cannot be said that the consideration has failed so as to entitle the plaintiff to recover. By the tenth paragraph of the case it appears that the defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the contract; in short, to give the plaintiff all that was bargained for. Now where, upon a verbal contract for the sale of land, the purchaser pays the deposit and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money. Secondly, we must consider the peculiar position of the parties as disclosed by the correspondence. It appears that after the purchaser received the abstract the solicitors examined it with the deeds and made requisitions. These were acts which assumed that a contract existed, and yet the plaintiff now proposes to take proceedings upon the footing that there was no contract at all. It will, no doubt, be said that everything was done "without prejudice to any question which might arise as to the contract of purchase," and that this reservation having been assented to, the defendant is bound by it. But, in my opinion, the words "without prejudice to any question which may arise" mean any question in the execution of the contract, and not any question as to the exist-

ence of the contract. I think that no solicitor would understand the plaintiff as reserving any question as to the existence of the contract. Under such circumstances the plaintiff is not entitled to recover the deposit. With regard to the case of Casson v. Roberts, 31 Beav. 613; 32 L. J. Ch. 105, I do not think that it has much bearing upon the present question, but I must say that I do not think the reasons upon which it proceeded are satisfactory.

Judgment for the defendant.

PHILBROOK v. BELKNAP.

6 Vt. 383.—1834.

Action on book account.

Plaintiff orally contracted to work for defendant for three years at $8 per month, but he was to receive no wages if he left (except in case of sickness) before the end of the three years. At the end of five and one-half months plaintiff wilfully quit defendant's service.

Phelps, J.—* * * If the plaintiff be entitled to recover at all, the claim becomes a mere claim for services at a fixed monthly compensation. * * *

It is argued, however, that the contract is void, by force of the statute of frauds. Admitting that this contract is within the terms of the statute, yet it may be well to inquire, what is the effect of the statute upon it. Although it is common to speak of a contract as void by the statute of frauds, yet, strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it. The statute provides that no action shall be sustained upon certain contracts, unless they are evidenced by writing. It operates, therefore, upon the contract only while it is executory. It does not make the performance of such a contract unlawful, but, if the parties choose to perform it, the contract remains in full force, notwithstanding the statute, so far as relates to the legal effect and consequences of what has been done under it. Hence a party may always defend under such a contract, when sued for any act done under it. Thus, suppose a crop of grass is sold by parole, and the vendee enters upon the land and cuts it. If an action of trespass should be brought against him, by the vendor, upon the ground that the contract was void, still although the contract is within the statute, it would furnish a sufficient defence, because it is executed. This very case affords an illustration of the effect of the statute. If the defendant had sued the plaintiff for not performing the contract, in not serving the full period, the case would be open to a defense under that statute; the contract being, to the purposes of such a suit, executory, and the at-

tempt being to sustain an action on it as such. But in this case, the contract, so far as the service has been performed, is executed, and is relied on as regulating and determining the right of the plaintiff to compensation for what has been done under it. We are here concerned only with what has been done. The question is, what the plaintiff is entitled to for his labor; and this depends upon the terms of the contract under which he performed the service. Had the whole service been performed, the rate of compensation would, without doubt, be regulated by the terms of the contract. No court would discard that contract, and resort to a *quantum meruit.* The principle is the same as to a performance in part. The defendant may be without remedy for the desertion of the plaintiff, but he may certainly protect himself as to what has been done. * * * *

ABBOTT v. DRAPER.

4 DEN. (N. Y.) 51.—1847.

ERROR to Columbia C. P. The parties joined issue before a justice of the peace, Abbott being plaintiff, and Draper defendant. The declaration was for goods sold and delivered, and the money counts: plea, the general issue. The cause was tried in December, 1843. The case was this: In October, 1842, the defendant agreed to sell the plaintiff a strip of land about six feet wide and running back to the water, for the sum of $60; one-half of which the plaintiff was to pay in money and the other half in goods out of his store. The goods were to be delivered immediately, as they might be called for by the defendant. The money payment was to be made in July, 1843, upon receiving which the defendant was to give a deed. The contract was reduced to writing; but was never signed by the parties. The plaintiff took possession and occupied the land; and delivered goods to the defendant in pursuance of the contract to the value of $23.57. Upon this state of facts the plaintiff brought this action in December, 1843, to recover the value of the goods. The jury found a verdict for the defendant, on which the justice rendered judgment, which the C. P. affirmed on *certiorari.* The plaintiff brings error.

BRONSON, Ch. J.—As the writing which was prepared was not signed, there was nothing more than a parol contract for the sale of the land, which was void by the statute of frauds. But still the parties have acted under the contract as though it were valid; and the plaintiff has received a benefit from it. He entered into the possession and enjoyment of the land; and there is nothing to show that he is not still in possession. It would be strange indeed if he could recover in this action on the ground that the contract was void; while he continues to receive advantage from it as a valid agreement.

He cannot thus treat the contract as both good and bad at the same moment. Honesty and fair dealing forbid it.

Although the statute declares a parol contract for the sale of lands void, it does not make it illegal. It is not a corrupt or wicked agreement; nor does it violate any principle of public policy. Parties are at liberty to act under such contracts if they think proper. Many such have been carried into complete effect, by payment of the price, and conveyance of the land. Part performance does not take the case out of the statute, so that the contract can be enforced in a court of law. But when the vendee has received the possession and paid a part of the price, the contract is not so utterly void that he can recover back the money just as though there had never had been an agreement. If he can recover at all so long as the vendor is not in the wrong, he must, at the least, first restore the possession, and demand the repayment of the money. It is impossible to maintain that he can retain the possession, and yet recall the money. And though he has never had the possession, or any other benefit under the contract, yet as he did not part with his money as a loan, but as a payment, he cannot recover it back without first demanding it from the vendor, and giving him notice that the contract is abandoned. When a man has paid money as due upon contract to another and there is no mistake, and no fraud or other wrong on the part of the receiver, there is no principle upon which it can be recovered back, until after a demand has been made. It cannot be right to subject a man to an action for money which was received as his just due, before he has had notice that he who paid it has changed his mind, and intends to repudiate the obligation under which the payment was made.

But the difficulty lies still deeper than this. So long as the vendor is not in default, but is ready to perform the contract on his part, I see no principle on which the vendee can recall the payments which he has made under the agreement. It was adjudged that he could not, in Dowdle v. Camp, 12 John. 451; and although there are some loose expressions in the books looking the other way, none of the cases maintain a different doctrine. When the vendor refuses to go on with the contract, or has parted with his title so that he cannot perform, he is then in the wrong; and having himself put an end to the contract, there is no longer any consideration for the payments which have been made under it; and the law will imply a promise to restore the money. But how can the law imply a promise to refund the money so long as the vendor is not in default? The payment was a voluntary one, made with a full knowledge of all the facts. Every time a payment was made and received, the parties virtually said, although the law will not enforce this contract, we will go on and carry it into effect. The money is not received as a loan, but as a payment; and so long as the vendor is able and willing to perform the contract on his part, he holds the money as owner, and not as a debtor. The consideration upon which the

money was paid has not failed, and there is nothing from which a promise to repay can be justly implied.[1]

In this case, the plaintiff was let into possession of the land, and, for aught that appears, he has the possession still. He is in default for not making the money payment which was due in July, 1843; while there has been no wrong whatever on the part of the defendant. So as far as appears, he is able and willing to convey on receiving the balance of the price. The defendant did not receive the goods in question as a debtor, but as a payment, and the consideration upon which they were delivered has not failed. Before the plaintiff can recover their value he must put the defendant in the wrong by tendering the balance of the purchase money and demanding a deed.

Should it be admitted that the vendee can repudiate the contract without any default on the other side, still he must give notice to the vendor that the contract is abandoned, and demand a return of the money paid, before he can sue to recover it. Any other rule would be plainly unjust toward the vendor. And yet that is the very thing which has been done by this plaintiff. After having made payments under the contract from time to time, he stopped short and brought this suit, without ever having told the defendant that he had changed his mind, or demanded payment for the goods which had been delivered. This is not fair dealing, and the law will not sanction it.

Judgment affirmed.[2]

KING v. WELCOME.

5 Gray 41.—1857.

THOMAS, J.—This was an action of contract on a *quantum meruit*, for labor done by the plaintiff for the defendant. The amount and value of the plaintiff's services were not disputed, but the defendant relied upon an express contract by which the plaintiff was to work for an entire year, and a breach of such contract by wrongfully leaving the plaintiff's service before the year expired. That contract was not in writing. By its terms, the plaintiff was to labor for one year from a day future. The plaintiff said that contract was within the statute of frauds, and could not be set up in defense to the action. So the court ruled.

[1] Accord, Collier v. Coates, 17 Barb. 471 (1854); Hoskins v. Mitcheson, 14 Upper Can Q. B. 551 (1857).

[2] Section 1183 of the Cal. Code of Civ. Pro. provides that certain building contracts shall be "wholly void," etc., unless in writing and filed for record. As to the effect of failure to comply with this requirement upon the right to recover in quasi-contract for benefits conferred, see Laidlaw v. Marye, 133 Cal. 170 (1901).

Rightly, we think; though, in the light of the authorities, the question is a nice and difficult one.

Upon the reason of the thing, and looking at the object and purpose of the statute, the result is clear. So far as it concerns the prevention of fraud and perjury, the same objection lies to the parol contract, whether used for the support of, or in defense to an action. The gist of the matter is, that, in a court of law, and upon important interests, the party shall not avail himself of a contract resting in words only, as to which the memories of men are so imperfect, and the temptations to fraud and perjury so great.

The language of our statute is, that "no action shall be brought upon any agreement that is not to be performed within one year from the making thereof, * * * unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Rev. Sts., c. 74, § 1, Cl. 5.

Looking at the mere letter of the statute, the suggestion is obvious, that no action is brought upon this contract. But the defendant seeks to "charge the plaintiff therewith," to establish it by proof, to enforce it in a court of law, and to avail himself of its provisions. And if the defense succeeds, the plaintiff is in effect charged with and made to suffer for the breach of a contract which he could not enforce, and which could not be enforced against him.

The difference, it is clear, is not one of principle. To illustrate this, let us suppose that in the contract, which the defendant seeks to set up in defense, there had been a provision for the payment of the wages stipulated, by semi-annual instalments. If, upon the expiration of the six months, the plaintiff had brought an action upon the contract to recover the instalment, the action could not be maintained; the statute of frauds would be a perfect defense. This is settled in the recent case of Hill v. Hooper, 1 Gray 131. But if in an action brought for money lent or goods furnished to himself or family, he may avail himself of the instalment, by way of set-off or payment; the difference is merely one of form, and not of substance.

Still further, upon the construction of the statute contended for by the defendant, the laborer in the contract stated would be without remedy. For if he brought his action upon the contract for the instalment, the statute of frauds would be a bar; if upon a *quantum meruit,* the express contract to labor for a year would be a bar.

The sounder construction of the statute, we think, is that a contract within its provisions is one which neither party can enforce in a court of law. Carrington v. Roots, 2 M. & W. 248; Reade v. Lamb, 6 Exch. 130; Comes v. Lamson, 16 Conn. 246. The cases in the exchequer go farther than is necessary to sustain the rule stated. They hold the contract, as a contract, is void, because it is a contract of which a party cannot avail himself in a court of law. Upon this point the recent case of Leroux v. Brown, 12 C. B. 801, is in conflict with them.

This court has not treated the contracts as absolutely void. When fully executed, they define and measure the rights of the parties thereto. And if this contract had been fully executed, and the plaintiff had earned the price stipulated, and had then brought *quantum meruit* on the ground that his services were reasonably worth more, the contract so executed would have been a full answer. Stone v. Dennison, 13 Pick. 1. But this contract was not performed; it was, to a great extent, executory. For breach of it by the defendant, no action could be maintained by the plaintiff. Nor, by parity of reason, can the plaintiff's breach of it be set up to defeat his reasonable claim for services rendered.

But though a contract within the statute of frauds, as a contract, cannot be enforced in a court of law, it may be available for some purposes.

A parol contract for the sale of land, though not enforceable as a contract, may operate as a license to enter upon the land, and, until revoked, be a good answer to an action of trespass by the owner.

So where money has been paid upon a parol contract for the sale of land, it cannot be recovered back, if the vendor is willing to fulfil the contract on his part. This is settled in the recent case of Coughlin v. Knowles, 7 Met. 57, a case which certainly resembles the one at bar, but which may be clearly distinguished from it. That action rests upon an implied assumpsit. The implied promise arises only upon the failure of the consideration upon which the money was paid. The plaintiff fails to show any failure of consideration. He shows the money was paid upon a contract not void, and which the defendant is ready to perform. The consideration upon which it was paid exists unimpaired. If the defendant had refused to convey, or if, as in the case of Thompson v. Gould, 20 Pick. 134, the property had been destroyed by fire, so that the contract could not be performed by the vendor, there would be a failure of consideration, from which an implied promise would arise, and the action could be maintained.

In the case at bar, the plaintiff shows services rendered for the defendant, and their reasonable value. The defendant, admitting the performance of the labor and its value, says the plaintiff ought not to recover, because he made an entire contract for a year, which he has not fulfilled. The plaintiff replies, that contract was for work for a year from a day future; it was within the statute of frauds; it was not in writing; it was not executed, and cannot be used in a court of law, either as the basis of an action, or to defeat a claim otherwise just and reasonable.

In the case of the money paid upon a contract for the sale of land, the action fails because no failure is shown of the consideration from which the implied promise springs.

In the case at bar, the defense fails because the contract upon which the defendant relies is not evidenced as the statute requires for its verification and enforcement. For it is the whole contract of which the defendant seeks to avail himself. His defense is not

that as to so much as is executed, as to so much time as the plaintiff has labored, he labored under the contract, and the price stipulated is to govern. But he relies upon the contract, not only so far as it is executed, but so far as it is still executory. He seeks first to establish the parol agreement as a valid subsisting contract, and then to charge the plaintiff with a breach of it.

A construction of the statute which would sanction this use of the contract, would lose sight of the obvious purposes of the statute. It would adhere to the letter at the expense of the spirit. It would operate unequally upon the parties. The weight of authority is against it. Exceptions overruled.[1]

COLEMAN, J., IN NELSON v. SHELBY MANUFACTURING COMPANY.

96 ALA. 515, 526.—1892-93.

IN many English cases, and in some of the states, it is held that money paid on a purchase of land cannot be recovered back, if the vendor is able and willing to carry out the contract of sale, although he may be under no legal obligation to perform. We are of opinion that this principle has never prevailed in this state. In Flinn v. Barber [64 Ala. 193], it is said that the validity of the contract does not depend upon the willingness or election of the vendor, but upon the sufficiency of the written note or memorandum of the contract of sale, subscribed by him, to make it obligatory upon him, or upon such a part performance by the vendee, as to remove the contract from the operation of the statute of frauds, so that it be-

[1] Accord, Freeman v. Foss, 145 Mass. 361 (1887).

In Riley v. Williams, 123 Mass. 506 (1878), the action was brought upon a *quantum meruit* and the evidence tended to show a special contract, not in writing, by which the plaintiff agreed to do certain work for the defendant, and to receive in payment therefor a lot of land, to be selected by him out of a number of lots owned by the defendant, and blacksmith's work to a stated amount from a firm of blacksmiths; and that the plaintiff, after performing the labor, refused to accept payment as stipulated in the contract. The court said: "Under the instructions given, the jury must have found that, although the services as claimed by the plaintiff were actually rendered, yet he had agreed that he should be paid in the manner stipulated in an executory contract which the defendants are ready and able to perform. If he was to be paid partly in a lot of land belonging to the female defendant, and partly in blacksmith's work to be furnished by Cameron & Emerson, and the jury were satisfied that the defendants were ready and willing at all times to convey the land at its fair market value and Cameron & Emerson were always ready to furnish the blacksmith's work for him when called for at agreed or reasonable prices, it is not for the plaintiff to object that this special contract was not binding because it was not in writing. It was wholly immaterial that no action could be maintained on this special contract, because it was not reduced to writing, if the defendants were ready and willing at all times to carry it into full effect. The plaintiff cannot force the defendants to take their stand upon the statute. Coughlin v. Knowles, 7 Met. 57. Wetherbee v. Potter, 99 Mass. 354, 361."

came mutually binding. We find nothing in the earlier or present statutes of frauds which supports the conclusion that a contract not enforceable against a vendor as provided in the former, or which is declared void as to him by the present statute, because there is no sufficient written note or memorandum of the agreement to comply with its mandates, subscribed by him, and which affords the vendor complete protection against his vendee, may, by his election or willingness to perform, avoid the statute, and convert a contract it declares void into a valid agreement, enforceable against a vendee, who has subscribed no note or memorandum of the agreement, and has done no more than pay a part of the purchase-money. In such a case neither party is bound, and the contract is void by the terms of the statute itself. A contract void under the statute of frauds is void for all purposes.[1]

IMPROVEMENTS.

LONG v. FINGER.

74 N. C. 502.—1876.

THIS was a civil action, in the nature of ejectment.

RODMAN, J.—The plaintiff has the legal title to the land in controversy, and is therefore admittedly entitled to recover unless the defendant has some equity to restrain him. The defendant alleges that the plaintiff by parol agreed to convey the lot to him on the payment of $150; that he thereupon entered into possession and put up improvements to the value of $150; he admits that he has never paid the plaintiff the purchase money and is unable to do so. He contends that he ought to be allowed the value of his improvements, or at least that the premises be sold and any excess they may bring over the purchase money, and damages for withholding the possession, and the costs of this action, may be paid to him.

It may be observed that although the contract was originally by parol and could not be enforced, yet as the plaintiff in his replication acknowledges the contract and offers to perform his part of it on performance by the defendant, the defendant does not need any decree of a court to give him that relief. It is competent for him to sell his estate in the premises, and if he can obtain for them a price in excess of the just demands of the plaintiff, the excess will be his, unless the plaintiff will have in that event a right to tack on his subsequent loan of $100. As no case is before us calling for any opinion as to the plaintiff's right in that respect, we express none. If the defendant cannot sell his estate in the premises subject to the plaintiff's claim, for anything, the inference is clear that al-

[1] Accord. Scott v. Bush, 26 Mich. 418 (1873), 29 Mich. 523 (1874); Koch v. Williams, 82 Wis. 186 (1892).

though his improvements have cost him something, they have added nothing to the value of the lot.

Beyond the remedy indicated, the defendant has no equity or title to relief. He relied in the argument on the case of Albea v. Griffin, 2 Dev. & Bat. Eq. 9, and others, to the effect that if a vendee by parol paid part of the purchase money, or entered and made improvements, although he could not enforce a specific performance on the ground of part performance, yet the vendor would not be allowed to turn him out without repaying what of the purchase-money had been paid and making compensation for the improvements. Obviously the present case does not stand on the same footing. Here the vendor does not set up the statute of frauds, but waives it, and is both willing and able to comply. The defendant alone is in default. There is no error and the plaintiff is entitled to judgment for the possession of the premises on the pleadings. * * * *

Per CURIAM. Judgment affirmed, with costs to the plaintiff in this court.[1]

MASSON v. SWAN, ADM'X, ET AL.

6 HEISK. (TENN.) 450.—1871.

NICHOLSON, CH. J.—In May, 1857, William Swan agreed to sell to Paul Masson a vacant lot in Knoxville for $600. The agreement was in parol, no note given for the purchase money, and no time fixed for its payment, and no written memorandum of the terms of sale. Masson took possession of the lot and proceeded to make permanent improvements upon it by erecting buildings thereon for a residence. From the 25th of December, 1857, to the 25th of December, 1860, he occupied the premises as a residence. No payment on the purchase money was made, and no application to Swan for a title. Swan died in March, 1859.

The bill was filed May 2, 1860, making no tender of purchase money, and asking for no execution of the contract by title from the heirs of Swan, but assuming that the contract was void because not reduced to writing, and claiming compensation for the permanent improvements to the amount of the enhanced value of the property, setting off against such the rents, after deducting the amounts paid for taxes and insurance. The widow of William Swan, as his

[1] Accord, Farnam v. Davis, 32 N. H. 302 (1855), in an action of assumpsit for improvements. In Hawkins v. Beal, 4 Dana (Ky.) 5 (1836), the vendee filed a bill in equity to recover the value of improvements, he having defaulted upon the oral contract and been evicted. The court said: "Had it clearly appeared that the non-execution of the contract was attributable altogether to his wilful delinquency or fault we should be indisposed to concede to him any right in equity to any compensation whatever." But it not being clear that the vendee's default was wilful he was allowed to recover.

administratrix, and his heirs, were made defendants. The heirs answered—those who were adults answering for themselves, and those who were minors by their regular guardian, the service of process on them being waived by him. By reference to the clerk and master the amount of the enhanced value of the lot was ascertained, to which was added the amount of taxes and insurance paid, and from the aggregate sum the amount of the rents was deducted. For the balance a decree was rendered, and an order of sale of the lot for its satisfaction.

Both sides have appealed. * * * *

It is said that there is no equity in the bill, and that complainant has no right to the aid of a court of equity to enable him to rescind the contract. By the recent decisions of this state the contract of sale was not absolutely void, but voidable upon the election of either party. Roberts v. Francis, 2 Heis. 128. Swan, the vendor, did not elect to avoid the contract, nor did his heirs after his death. Complainant made no tender of the purchase money, and could not claim a title until he had done so. He rested upon the parol contract, made the improvements, and occupied the property as his own under the parol contract until May 2, 1860, when he elected to avoid the contract and claim compensation for his improvements. He had the right to make his election, and as the improvements were made under a subsisting parol contract, he had the right to come into a court of equity to have his claim for compensation enforced. The equity springs from the fact that the contract is not void but voidable, and that either party has the right to avoid it. Rhea v. Allison, 3 Head 176.

The equity of complainant is the amount of the enhancement of the value of the lot in market, resulting from the permanent improvements made upon it; this value to be estimated at the time he made his election to avoid the contract. The amounts actually expended in making or superintending the improvements do not furnish the criteria for ascertaining the enhanced value, though they may be looked to as legitimate evidence in the investigation. But as complainant seeks the enforcement of an equity, he is bound to do equity; hence, he is required to account for the benefits derived from the use and occupation of the property. As he elects to repudiate the contract, and along with it the payment of the purchase money, equity requires him to account for reasonable rents. During the occupation of the lot the law imposed taxes on the property. These were encumbrances, for the removal of which he ought to have credit upon the amount of the rents. But the insurance paid upon the property stands on a different footing. He insured the property voluntarily and for his own protection, and while he was holding and treating the property as his own. We see no equity in allowing him a credit for this expenditure. The balance due to complainant will bear interest from the filing of the bill.

The only remaining question is as to whether the enhanced value should be paid by the administrator or the heirs? It cannot be re-

garded as a debt against the administrator. The liability arose upon the election of complainant to avoid the contract, and it is a liability arising out of no default on the part of the intestate or his administratrix. For all we can see, the intestate was ready at any time to make title if complainant had entitled himself to it by tendering or paying the purchase money. Not electing to do this during the lifetime of the intestate, and only making his election to avoid the contract after the legal title had descended to the heirs of the intestate, at which time his equitable claim for compensation came into existence, we think it clear that the liability attaches to the property itself out of which it sprung, and that it cannot be viewed as a debt of the estate to be paid by the administratrix. The real estate and not the personal is benefitted by the improvement, and equity necessarily fixes the liability for the benefit on the real estate.

With the modifications indicated the decree of the chancellor is affirmed. The heirs will have four months with which to pay the amount ascertained to be due. The clerk of this court will make report of the amount due to the present term. The costs will be paid by complainant.[1]

---

ii. *Defendant in Default.*

RICHARDS v. ALLEN.

17 ME. 296.—1840.

ASSUMPSIT for a quantity of bricks delivered in 1829, and a yoke of oxen delivered January 27, 1832. The writ was dated January 27, 1838. Eighteen or twenty years before the commencement of the suit, the plaintiff contracted verbally with the defendant for the purchase of a farm, and entered upon the farm under that verbal contract, and lived thereon until the time of trial. The bricks and the oxen were delivered at the respective times charged in part payment of the farm, under the verbal contract for the purpose thereof.

WESTON, C. J.—The contract between the parties in regard to the farm, was one, which being by parol, could not be enforced at law. It was however morally binding; and payments made by the plaintiff on account of the purchase could not be reclaimed so long as the defendant was in no fault. But if he, without any justifiable cause, repudiated the contract, and refused to be bound by it, a right of reclamation would accrue to the plaintiff, to the extent required

[1] But recovery for improvements will not be allowed to the vendee in default, who has notice that the vendor was opposed to the improvements being made. Rainer v. Huddleston, 4 Heisk. (Tenn.) 223 (1871).

administratrix, and his heirs, were made defendants. The heirs answered—those who were adults answering for themselves, and those who were minors by their regular guardian, the service of process on them being waived by him. By reference to the clerk and master the amount of the enhanced value of the lot was ascertained, to which was added the amount of taxes and insurance paid, and from the aggregate sum the amount of the rents was deducted. For the balance a decree was rendered, and an order of sale of the lot for its satisfaction.

Both sides have appealed. * * * *

It is said that there is no equity in the bill, and that complainant has no right to the aid of a court of equity to enable him to rescind the contract. By the recent decisions of this state the contract of sale was not absolutely void, but voidable upon the election of either party. Roberts v. Francis, 2 Heis. 128. Swan, the vendor, did not elect to avoid the contract, nor did his heirs after his death. Complainant made no tender of the purchase money, and could not claim a title until he had done so. He rested upon the parol contract, made the improvements, and occupied the property as his own under the parol contract until May 2, 1860, when he elected to avoid the contract and claim compensation for his improvements. He had the right to make his election, and as the improvements were made under a subsisting parol contract, he had the right to come into a court of equity to have his claim for compensation enforced. The equity springs from the fact that the contract is not void but voidable, and that either party has the right to avoid it. Rhea v. Allison, 3 Head 176.

The equity of complainant is the amount of the enhancement of the value of the lot in market, resulting from the permanent improvements made upon it; this value to be estimated at the time he made his election to avoid the contract. The amounts actually expended in making or superintending the improvements do not furnish the criteria for ascertaining the enhanced value, though they may be looked to as legitimate evidence in the investigation. But as complainant seeks the enforcement of an equity, he is bound to do equity; hence, he is required to account for the benefits derived from the use and occupation of the property. As he elects to repudiate the contract, and along with it the payment of the purchase money, equity requires him to account for reasonable rents. During the occupation of the lot the law imposed taxes on the property. These were encumbrances, for the removal of which he ought to have credit upon the amount of the rents. But the insurance paid upon the property stands on a different footing. He insured the property voluntarily and for his own protection, and while he was holding and treating the property as his own. We see no equity in allowing him a credit for this expenditure. The balance due to complainant will bear interest from the filing of the bill.

The only remaining question is as to whether the enhanced value should be paid by the administrator or the heirs? It cannot be re-

garded as a debt against the administrator. The liability arose upon the election of complainant to avoid the contract, and it is a liability arising out of no default on the part of the intestate or his administratrix. For all we can see, the intestate was ready at any time to make title if complainant had entitled himself to it by tendering or paying the purchase money. Not electing to do this during the lifetime of the intestate, and only making his election to avoid the contract after the legal title had descended to the heirs of the intestate, at which time his equitable claim for compensation came into existence, we think it clear that the liability attaches to the property itself out of which it sprung, and that it cannot be viewed as a debt of the estate to be paid by the administratrix. The real estate and not the personal is benefitted by the improvement, and equity necessarily fixes the liability for the benefit on the real estate.

With the modifications indicated the decree of the chancellor is affirmed. The heirs will have four months with which to pay the amount ascertained to be due. The clerk of this court will make report of the amount due to the present term. The costs will be paid by complainant.[1]

---

ii. *Defendant in Default.*

RICHARDS v. ALLEN.

17 ME. 296.—1840.

ASSUMPSIT for a quantity of bricks delivered in 1829, and a yoke of oxen delivered January 27, 1832. The writ was dated January 27, 1838. Eighteen or twenty years before the commencement of the suit, the plaintiff contracted verbally with the defendant for the purchase of a farm, and entered upon the farm under that verbal contract, and lived thereon until the time of trial. The bricks and the oxen were delivered at the respective times charged in part payment of the farm, under the verbal contract for the purpose thereof.

WESTON, C. J.—The contract between the parties in regard to the farm, was one, which being by parol, could not be enforced at law. It was however morally binding; and payments made by the plaintiff on account of the purchase could not be reclaimed so long as the defendant was in no fault. But if he, without any justifiable cause, repudiated the contract, and refused to be bound by it, a right of reclamation would accrue to the plaintiff, to the extent required

[1] But recovery for improvements will not be allowed to the vendee in default, who has notice that the vendor was opposed to the improvements being made. Rainer v. Huddleston, 4 Heisk. (Tenn.) 223 (1871).

given to the jury upon the question of the rescission of contracts and all other questions arising in the case, and that the verdict for plaintiff was properly rendered upon the evidence, provided the action of *indebitatus assumpsit* will lie upon the facts here stated. Defendant claims that there has been a part performance by plaintiff in conveying the wild land to defendant, and that plaintiff has a remedy by bill in equity to enforce a specific performance of the contract, and that having such a remedy he can have no other. But we do not understand such to be the law.

In Allen v. Webb, 24 N. H. 278, it is held that "where one party to a contract refuses to perform his part of the same, the other party may insist upon the contract being carried out, or he may avail himself of the refusal and rescind the contract." Without considering, therefore, whether the part performance by plaintiff was such as to take the case out of the statute, and enable him to enforce a specific performance on the part of defendant, we think that if such were the admitted fact, the plaintiff might elect his remedy, and either enforce the contract or rescind it and recover back the value of the land he had conveyed. If the defendant had not sold this land, the count for money had and received could not have been maintained, though the count for land sold would then have been well enough. But the plaintiff may now, by adopting the act of selling on the part of defendant and ratifying the same, recover the money which defendant received for the land under the count for money had and received.

A verdict may therefore have been properly returned for plaintiff on either count in his declaration. The defendant has no cause of complaint and the exceptions are overruled. See Stevens v. Cushing, 1 N. H. 18; Lane v. Shackford, 5 N. H. 130; Child v. Moore, 6 N. H. 33; Fuller v. Little, 7 N. H. 535; Luey v. Bundy, 9 N. H. 298; Ayer v. Hawkes, 11 N. H. 148; Snow v. Prescott, 12 N. H. 535; Gillet v. Maynard, 5 Johns. 85; Merrill v. Downs, 41 N. H. 72.

Judgment on the verdict.[1]

[1] Does the Existence of the Equitable Remedy of Specific Performance Debar Plaintiff From a Quasi-Contractual Action?—In Reynolds v. Reynolds, 74 Vt. 463 (1902), plaintiff, who was defendant's brother, worked on defendant's farm under an oral contract whereby defendant was to convey plaintiff an interest in the farm. Defendant broke the contract and plaintiff sued for his labor. The court said: "The defendant suggests that in any event the plaintiff ought not to recover in this action because he might have enforced specific performance in equity,—that the plaintiff's living and working upon the farm, and having the place set in the tax list to himself and his brother jointly, and paying one-half the taxes, amounted to taking possession, and was a part performance that would have avoided the effect of the statute of frauds. We have not considered whether the plaintiff was in a position to have sought relief in equity, for if he was, the defendant cannot take advantage of that. The contract was not one for the breach of which the plaintiff could sue at law, for it was not in writing, but he still had this action for the value of his services. If there was an equitable relief also, it was for the benefit of the plaintiff, not of the defendant, who cannot insist that he

GAY v. MOONEY.

67 N. J. L. 27.—1901.

DIXON, J.—The defendant's intestate was the uncle of the plaintiff's wife, and for several years before his death resided in the plaintiff's family. In the present suit the plaintiff sought to recover compensation for the board and lodging furnished to the deceased.

In order to rebut a presumption that the service was rendered and received as a gratuity, the plaintiff put in evidence tending to show an understanding between himself and the deceased that the latter would devise a certain dwelling house to the plaintiff's children in return for what he should receive as a member of the family. For such a purpose this evidence was plainly legitimate. It came within the rule laid down in Disbrow v. Durand, 54 N. J. Law 343, 24 Atl. 545, 33 Am. St. Rep. 678, that in cases like the present a reasonable and proper expectation that there would be compensation must, and hence may, be shown. The bargain thus exhibited is not one on which an action at law could be maintained, because it related to land, and was not susceptible of such proof as the statute of frauds requires; but when, in pursuance of a bargain for this reason unenforceable, services have been rendered, the legal remedy is by an action on the *quantum meruit* for the value of the services. McElroy v. Ludlum, 32 N. J. Eq. 828. As was said in Stone v. Todd, 49 N. J. Law 274, 281, 8 Atl. 300, the intended devise was but the method of paying an admitted obligation, and, if payment in that manner be not made, the creditor is entitled to recover the value of the services.

Although the bargain between the plaintiff and the intestate contemplated payment to be made to the plaintiff's children, and not directly to himself, yet, as that bargain did not take the form of an actionable contract, it falls out of view as a ground of legal remedy, and appears only to give color to the conduct of the parties in furnishing and accepting the service rendered. It affords the means of determining that the service was not a gift, but a sale, and out of that determination the law deduces a right in him who sold the service to be paid its value by him who bought it. These principles sufficiently answer the important exceptions taken at the trial and all the exceptions mentioned in the brief of counsel. The other exceptions, therefore, need not be noticed.

The judgment of the Middlesex pleas is affirmed.[1]

should be compelled to do what he has been asked to do and has refused. That one has an adequate remedy at law may be a reason why equity should not hear his prayer, but that he might have claimed relief in equity is no reason why he should not have his usual remedy at law. The plaintiff should recover, then, what his labor was worth."

[1]Accord, Graham v. Graham, 134 N. Y. App. Div. 777 (1909).

WILLIAMS v. BEMIS, EXECUTOR.

108 MASS. 91.—1871.

CONTRACT for work done and materials furnished in cultivating the land of Harolin Towne, the defendant's testator. Trial in the superior court, before SCUDDER, J., who, before verdict, by consent of the parties, made a report of the case, of which the material parts were as follows:

"The plaintiff testified that the work was done and the materials used by him upon the land of Towne under Towne's general direction. On cross-examination he testified, against his own objection, that before he began the work Towne said he might take the land for one year and plant it with potatoes, and he would furnish one-half the seed and the necessary dressing, and give the plaintiff two-thirds of the crop; that the plaintiff declined to take the land for one year upon the terms named, telling Towne that the labor and seed to be furnished by him would cost more than he could get for it the first year; but that he told Towne he would take the land and do the work on it for two years for two-thirds of the crop for two years, the plaintiff to furnish one-half of the seed and all the labor, and Towne all the manure, and phosphate if necessary, and Towne assented; that the work named in the declaration was done under the contract during the first year; that at the expiration of the first year the crop of that year was divided according to the contract, the plaintiff taking two-thirds and Towne one-third thereof; that Towne then refused to allow the plaintiff to plant the land the second year; and that the work done and seed furnished and used upon the land by the plaintiff during the first year was more than was necessary for the first year's crop, and of greater value than the plaintiff's share of that crop, and inured to the permanent benefit of the land, and of the crop for the second year, as was understood and anticipated by the parties when the contract was entered into and the work was done and the seed used upon the land."

If upon this testimony the plaintiff was to recover anything beyond the crop already received by him, then judgment was to be entered for the plaintiff for the sum of $53.25, otherwise judgment to be entered for the defendant.

AMES, J.—* * * * The defendant insists that the work was done by the plaintiff in the cultivation of crops which were to be partly his own, and was not done upon the credit of Towne, or with any expectation of charging it against him. Such undoubtedly was the understanding of the parties originally. But as Towne saw fit to say that the special contract was not binding upon him, it cannot be set up by his executor as binding upon the plaintiff. King v. Welcome, 5 Gray 41. It cannot be treated as a nullity for one purpose, and as a contract for another. It required two years for its completion, and both parties understood that there was to be

no profit or advantage to the plaintiff except from the operations of both years taken together. A large part of the labor and expense incurred in the first year, had no reference whatever to the operations and results of that year, taken by itself, but were a preparation of the land for increased productiveness in the second year. The plaintiff must be considered as having, in that way, paid in advance, in part at least, for the privilege of using the land the second year in the manner agreed upon. By the repudiation of the contract, he has lost the privilege which he had so paid for. The consideration upon which he made that payment has failed by the wilful act of the other party to the contract, and he is therefore entitled to recover back what he has so paid. Basford v. Pearson, 9 Allen 387. If it had been a payment in money, it would be too plain to be controverted. A payment in labor and services, of which the other has secured the benefit, stands upon the same ground.

Judgment for the plaintiff for the sum agreed.

BANKER v. HENDERSON.

58 N. J. L. 26.—1895.

Reed, J.—This action was brought to recover the value of the labor and materials expended by the plaintiff in making a wood chopper. It appeared in evidence that the plaintiff verbally agreed to furnish to the defendant a boiler, engine, saw, and wood chopper, for the sum of $450. The engine and boiler were then in existence, but the saw and the chopper were to be made. They were all to be used together, and the price was entire. The defendant refused to receive them, and on account of his refusal they were never delivered. On the trial, upon an objection interposed by the counsel for the defendant that this parol agreement was within the statute of frauds, the trial court ruled that this was so in respect to the boiler and engine, which were in existence when the agreement was made. The court also ruled that the contract was entire, and not severable, and therefore the whole was within the statute. Nevertheless the court permitted the plaintiff to prove the value of his labor expended by him in building the chopper, and also the value of the material used for that purpose. The jury was charged that it could return a verdict for this amount, which amount the jury assessed at $278.71. To this charge the defendant took an exception. The result of this is that the title, not only to the engine and the boiler, but to the wood chopper, upon which this labor and material were expended, remains in the plaintiff, while the defendant, who receives no benefit whatever from it, pays for all this which went to the enhancement of the plaintiff's property, or rather to the creation of property for the plaintiff.

The theory upon which the right to recover for labor or materials furnished under a void contract rests is that one person has received such a benefit as would raise an implied assumpsit on his part to pay for it, and that his failure to perform his side of the contract gives a right of action against him upon this implied assumpsit. In McElroy v. Ludlum, 32 N. J. Eq. 828, services as superintendent had been actually rendered in the business of the firm under an agreement invalid because of the statute. In Mayor v. Pyne, 3 Bing. 285, under a void agreement to deliver twenty-four numbers of a periodical work, eight numbers had been delivered. Upon refusal of defendant to take the rest, there was a recovery for the eight actually received. In Shute v. Dorr, 5 Wend. 204, a parent bargained to receive $100 for the services of his child from the ages of sixteen to twenty-one years. He was permitted to recover on *quantum meruit* for the services actually rendered, the contract being void under the statute. Indeed, in every case in which a recovery has been permitted on the common counts under these conditions, there has been money advanced under the contract, or labor or materials furnished for the benefit of defendant or his property. Lockwood v. Barnes, 3 Hill 128; Gray v. Hill, Ryan & M. 420; Williams v. Bemis, 108 Mass. 91. Thus, if one puts improvement upon land which he occupies as vendee, under a verbal agreement for a deed or devise, on failure of the other party to carry out the unenforceable agreement he cannot recover the value of such improvements. The reason is that the improvements were not made at the special instance or request of the vendor, nor for his benefit. Where, however, the improvements were put on at the special instance of the defendant, and for the benefit of his estate, an action lies. Smith v. Smith, 28 N. J. Law 208. The rule is illustrated in the case of Dowling v. McKenney, 124 Mass. 478. There was a parol agreement that plaintiff would finish a monument to order, and was to take in pay a lot of land and some cash. He completed the monument, which defendant refused to accept. In an action brought for the value of the labor and materials supplied in completing the monument the right to sue was disallowed. The court said: "It is true that, when a person pays money, or renders services, or makes a conveyance under an agreement within the prohibition of the statute of frauds, and the other party refuses to perform it, an action will lie to recover the money so paid, or the value of the services rendered, or the property conveyed; but it is on the ground that a party who has received a benefit under an agreement which he has repudiated shall be held to pay upon an implied assumpsit for that which he has received. The defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss." Had this wood chopper been delivered, or had work been done upon defendant's ground by which some benefit accrued to defendant's property, the case would present a different aspect, for then the value of such work or materials to the defendant would be recoverable. But in this case, as in the

preceding, the title to the completed articles remaining in the plaintiff, no benefit whatever accrued to the defendant. The judgment is reversed, and a *venire de novo* awarded.

JOSEPH S. SMITH v. THE ADMINISTRATORS OF JOHN S. SMITH.

4 DUTCH. (N. J.) 208.—1860.

THE declaration, besides several special counts, contained the ordinary common counts.

CHIEF JUSTICE.—The contract proved upon the trial of this case, or which the evidence tended to prove, was clearly within the statute of frauds and perjuries. It was a contract for the transfer of an interest in land. The plaintiff, who was tenant from year to year of his father (the defendant's intestate), erected new buildings upon the demised premises upon the authority of his father, who told the plaintiff "to go on and build, and the farm should be his," or, as another witness testified, "to go on and fix what he had a mind to—he had left it to him." The evidence in the cause would have warranted the jury in finding that the plaintiff erected the buildings with the consent and approbation of his father, upon his express promise that the farm should be his upon his father's death, by deed or devise. The contract to transfer the land, being within the statute of frauds, was void, and cannot form the foundation of an action. The plaintiff, therefore, clearly could not sue upon the special contract.

May the jury lawfully infer a promise to pay for the improvements in money out of the personal estate of the deceased? It is clear, from the evidence, that the erection of the buildings was not a voluntary service, nor a service rendered relying upon the generosity of the intestate to make compensation. The son expressly refused to proceed with the buildings till he had his father's promise that the farm should be his. The case, therefore, does not fall within the familiar principle, that no promise can be implied to pay for gratuitous services or services rendered in expectation of a legacy. Grandin v. Reading, 2 Stock. 370; Johnson v. Hubbell, 2 Stock. 332; Jacobson v. Ex'rs of Le Grange, 3 Johns. 199; Martin v. Wright, 13 Wend. 460; Little v. Dawson, 4 Dall. 111.

But will the law raise an implied promise to pay money when there was an express promise to pay in land? The answer is, that the promise to pay in land was void, and therefore no promise. If the plaintiff had erected the buildings upon the intestate's land at his request, the law would have implied a promise to pay for them. The plaintiff is in no worse situation because the defendant made an express promise to pay for the services in a particular mode, which

promise is itself a nullity. The true principle, says Mr. Chief Justice NELSON, is this: "The contract being void and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof may treat it as a nullity, and recover the money or the value of the services rendered under the common counts. This is the universal rule in cases where the contract is void for any cause not illegal, if the defendant be in default." King v. Brown, 2 Hill 486.

The principle seems to be perfectly well settled, and is sustained by very numerous authorities, that where a party to an agreement void by the statute of frauds fails to execute it, the price advanced, or the value of the article delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back. Mavor v. Pyne, 3 Bing. 285; Gray v. Hill, Ry. & M. 42; Gillet v. Maynard, 5 Johns. R. 85, and cases cited in note a; Shute v. Dorr, 5 Wend. 204; Lockwood v. Barnes, 3 Hill 128; Abbott v. Draper, 4 Den. 51.

In all such cases the law raises by implication a promise to repay advances made upon the faith of the contract, and for which no consideration has been paid. If, as a consideration for the improvement, the intestate had agreed to devise to the plaintiff a different tract of land from that upon which the improvement was made the case would be clear of difficulty. But as the improvement is made upon the farm agreed to be devised, it may be urged that the improvement was made not for the benefit of the intestate, but for the plaintiff's own benefit, inasmuch as he resided upon the farm during his life, and expected to receive it after his death. It is true that where the vendee in possession under a parol agreement for the purchase of land makes improvements upon the premises he cannot recover the value of such improvements in an action at law, upon the refusal of the vendor to fulfil the contract. Gillet v. Maynard, 5 Johns. 85; Shreve v. Grimes, 4 Littell 224. The improvements in such case are not made at the instance or request of the vendor, nor for his benefit, but for the benefit of the party making them. The law, therefore, will imply no promise by the vendor to pay for them. But this case does not fall within that principle. The plaintiff was not in possession under a contract for the land, but as tenant from year to year paying rent. The improvements inured to the benefit of the intestate. He might, upon the completion of the improvements, have turned the plaintiff out of possession, or demanded and received an increased rent for the premises during his life. He was instrumental in having the improvements made. The plaintiff refused to make them until he had his father's promise that the land should eventually be his. The improvements were not only made by the procurement of the intestate, and for his use, but his estate has actually received the increased value of the improvements made by the money and the labor of the plaintiff. There seems no good reason, either in law or equity, why the jury may not

infer a promise to pay for them. If it be objected that the evidence in the cause admits of a different interpretation, and that the terms of the contract were different from those above stated, the answer is, that what is really proved by the evidence was a question of fact, and should have been submitted to the jury. * * * *[1]

HAWLEY v. MOODY.

24 Vt. 603.—1852.

Assumpsit. Plea, the general issue, and trial by the court. On trial, the plaintiff gave evidence tending to prove, that on the 11th day of July, 1851, he contracted with the defendant for a lease of the defendant's tavern-stand in Waterbury (called the Waterbury House), for one year from and after the first day of September, 1851, for six hundred dollars; and paid the defendant at the time one hundred dollars, in a gold watch, which defendant received as a payment of one hundred dollars toward the rent. And it was further stipulated at the time, that the parties should meet at Mr. Dillingham's office as soon as he returned home (he being absent that day), and execute a written lease. The contract was all in *parol.* The plaintiff called upon the defendant for the lease, and the defendant soon after, on the same day, tendered the watch back to the plaintiff, which the plaintiff refused to receive, and the watch was afterward attached by one of the plaintiff's creditors, and sold on execution against the plaintiff. The defendant, on the 14th day of July, 1851, leased the same premises to one Howard for one year, and declined to lease them to the plaintiff. The plaintiff tendered to the defendant, on the first day of September, 1851, five hundred dollars in specie, and demanded a lease of the premises, according to the contract, which defendant declined.

The county court, March term, in Washington county, 1852, Poland, J., presiding,—adjudged that plaintiff could not recover, and rendered judgment for defendant. Exceptions by plaintiff.

Redfield, J.—1. The statute of frauds in this state contains no exception of leases, or contracts for leases *in futuro,* as is found in the English statute and in some of the other states. This case falls, therefore, within the statute. * * * *

4. The only remaining inquiry then is as to the effect upon the title of the watch, of defendant's refusal to complete the contract. If this were to be regarded like the case where one is induced to purchase property, by fraudulent representations, and where, upon

[1] "If the plaintiffs, in consideration of an agreement which was within the statute of frauds, and which the defendant declined to carry out, expended money in building upon his land, they might maintain an action to recover the cost of such building."—Parker v. Tainter, 123 Mass. 185 (1877).

the discovery of such facts, he elects to rescind the contract, as he may, then the property would revest. But here is no fraud in the contract, neither is it the object of the statute to attach to this class of contracts any mark of reproach. The contract is innocent enough, if each party chooses to trust to the honor of the other party as to its performance. If that were not so, one could not recover for payments made under it. The contract is not void, or affected with any taint or turpitude, nor is it rescindable at the election of either party.

Either party, if he choose, may repudiate it, but that only operates upon so much of the contract as remains executory at the time, and does not repeal anything done under it. For these purposes it remains in full force. And the party repudiating must be content to lose what he has done under it, as, the contract remaining in force, the other party may defend under it. But if the party repudiating the future performance has himself received advances which he declines to pay for in the mode stipulated, it is regarded as equitable that he should refund in the usual mode for money had and for goods sold, and it is not in his power without the consent of the other party, to revest the title of the specific things received. This seems to us the only view consistent with general principles applicable to the subject, or with the decided cases, and manifestly just and equitable. If the party has bought goods which he declines to pay for in the mode stipulated, and which but for his own act he might do, he ought and he must be content to pay in the usual mode of paying for goods sold and delivered, and this recovery may be had under the general counts. Gray v. Hill, 1 R. & M. 420; Chitty on Contracts 305.

As the former cases upon this subject have adopted no principle at all analogous to allowing either party the power of rescission of the contract, we feel reluctant to push ourselves upon an unexplored field, without some obvious and pressing necessity, in order to warp justice, which we think is not this case. By the adoption of this new feature, even if it were more consonant with justice in the particular case, which we think it clearly is not, we should be fearful of ultimately encountering evils which are not apparent at the moment. And there are some which we could easily foresee might arise. The specific things received in payment might have been more or less put to use by the party receiving them, for which he ought to be accountable. They might have been sold and transferred in different modes, and thus new rights and interests intervene. And if we adopt the principle of rescission, we do not see, but in principle, it will cut off by the roots all rights accrued under the contract before repudiation, which would certainly be unjust to the innocent party. And as the repudiating party is always clearly in the wrong, it can be no hardship upon him, to pay in currency for what he has received in advance upon the contract. If one party has the power of rescission, then the other, and especially the innocent party, should have the power. The result of which must be that, however many times the property has changed hands, or under

whatever circumstances, the innocent party may pursue it and recover of the last proprietor, if not of each intervening one, which would often be attended with serious embarrassment and probable wrong.

Judgment reversed and case remanded for new trial.[1]

LOCKWOOD v. BARNES.

3 Hill (N. Y.) 128.—1842.

Barnes brought replevin against Lockwood in the court below for two colts. The plaintiff in the court below owned a stud-horse, and the defendant a breeding mare. After the defendant had declined having the services of the horse, saying he did not wish to raise any more horses, it was agreed between the parties that the plaintiff should have the use of the mare, and should pay the defendant as follows, viz.: if the issue was a horse colt, $25, and if it was a mare colt, $20. The mare was to remain in the possession and ordinary use of the defendant, and he was also to keep the colt until the usual time for weaning, or until it was four or six months old. No time was specified for the payment of the money. On these terms the horse was put to the mare. This was in June, 1837. In May, 1838, the mare had two horse colts. In April, 1839, the plaintiff tendered the defendant $25, offered to pay for the keep of the colts from the time they were six months old, and demanded the colts. The defendant refused to deliver them, and the plaintiff brought replevin. The defendant insisted, among other things, that the agreement was void within the statute of frauds—it being one not to be performed within a year, and there being no writing. The court overruled the objection, and the defendant excepted. Verdict and judgment for the plaintiff. The defendant brought error.

Bronson, J.—* * * * As I understand the agreement in this case, the colt was not to be delivered to the plaintiff until it was at least four and perhaps six months old. This, added to the eleven months for gestation, would make the whole period which was to elapse before the contract could be completely executed fifteen or seventeen months. It appears, then, that by the terms of the agreement, it was not to be performed within a year, and the fact of a part performance within that time will not aid the case. Although no time was specified for the payment of the money by the plaintiff, it was, I think, payable at the time the colt was to be delivered, and not before; and so on neither side was there to be a complete performance within the year.

As the defendant refused to go on with the agreement after he

[1] Accord, Booker v. Wolf, 195 Ill. 365 (1902).

had derived a partial benefit under it, he must pay for the use of the horse; but as the contract was void, the plaintiff acquired no title to the colts, and the court below erred in allowing him to recover. It is, of course, unnecessary to examine the other questions made by the bills of exceptions. Judgment reversed.

ANDREWS, J., IN REED v. McCONNELL.

133 N. Y. 425, 430, 433, 435.—1892.

THERE is an insuperable difficulty in the way of the plaintiff on this appeal. He has been permitted to recover upon a cause of action not alleged in the complaint. He sought in his pleading to recover damages for the breach of an alleged contract. He failed to establish that any valid contract was made, for the reason that the contract proved was void by the Statute of Frauds. It is substantially admitted by the plaintiff that the contract sued upon is within the statute, but it is contended on his behalf that the defendants having on the trial insisted upon the statute as a bar to the enforcement of the contract, the plaintiff was entitled to recover in this action the value of any property received thereunder by the defendants from the plaintiff. The defendants, on the trial, contended that this was a new and different cause of action, not within the pleadings, and inconsistent with the cause of action alleged in the complaint. The plaintiff made no application for amendment. The trial judge overruled the contention of the defendants and awarded to the plaintiff, among other things, the sum of $12,500, as the value of a bark contract which the court found was a contribution of the plaintiff to the tannery enterprise, which was the subject of the void contract. * * * * A cause of action founded on a contract to recover damages for its breach, and a cause of action to recover the value of property received thereon by the party who afterwards repudiates it as void by the Statute of Frauds, are fundamentally different. The claim that there was no valid contract, and that, therefore, there is a right of action for the value of property received under it, is totally inconsistent with a claim to enforce the contract and to recover upon it. * * * * Because facts are developed in the trial of one cause of action which suggest a right of recovery in an action for a different cause, this does not authorize the substitution of the latter cause for the one alleged. The argument urged by the appellant that the defendants waived their rights by not objecting specifically to the evidence of the value of the bark contract when it was first offered on the ground of the statute, is not, we think, tenable. They objected generally that the evidence was incompetent and immaterial. When the plaintiff rested they took the point that the contract proved was void by the statute. The plaintiff had ample notice of the ground taken.

He applied for no amendment of the complaint, but, on the contrary, insisted that he was entitled to recover the value of the bark contract under the pleadings as they stood.[1] * * * *

IMPROVEMENTS.

OREAR v. BOTTS.

3 B. MON. (KY.) 360.—1843.

MARSHALL, J.—It was decided by this court, in the case of Shreve v. Grimes (4 Littell 220), that a purchaser of land by parol could not recover in assumpsit from the vendor, after he [the vendor] had repudiated the contract, the value of improvements or ameliorations made on the land by the vendee before such repudiation. And although we are not satisfied that an assumpsit, to remunerate the vendee to the extent of the actual benefit derived from his labor, by the vendor, might not be implied, on the ground that the vendor, in violation of his promise, voluntarily takes to himself the labor of the vendee, which had been authorized and induced by a reliance on that promise; yet, as there has been a decision of this court against it, and as the question of improvements is, in such cases, involved with the question of rents, and the Court of Equity, which seems to be the more appropriate tribunal for settling these questions, affords an adequate and well-known remedy; and as, moreover, the application of the action of assumpsit to the recovery of the value of improvements as a separate subject might tend to embarrass rather than to facilitate the proper adjustment of such cases, we do not feel authorized, in opposition to the case referred to, and in the absence of direct authority to the contrary, to extend the doctrine of implied assumpsit to the present case.

In this case, it is true, there was not an absolute sale of the land, but a parol lease or license to occupy for life, and there are some other distinguishing circumstances; but although these distinguishing circumstances might show that the reasoning of the court in the case of Shreve v. Grimes does not fully apply to the case before us, they would still leave it within the principle then declared. If that principle be correct, the peculiar circumstances referred to are not such as should relieve this case from its operation; nor are they such as to obviate the objections to opening this new field of implied assumpsits, or to giving such an application of the action of assumpsit as by submitting to a jury the assessment of damages arising out of a violation, by the vendor, of his parol contract for the sale of land, might effect a virtual repeal of the statute of frauds on that subject.

[1]As to amendment at the trial, see Martin v. Home Bank, 160 N. Y. 190 (1899).

There was no error, therefore, in instructing the jury to find as in case of a non-suit, and the judgment is affirmed.[1]

ALBEA v. GRIFFIN ET AL.

2 DEV. & BAT. EQ. (N. C.) 9.—1838.

BILL for specific performance.

GASTON, J.—* * * * It is objected on the part of the defendants that by our act of 1819 all parol contracts to convey land are void, and that no part performance can, in this state, take a parol contract out of the operation of that statute. We admit this objection to be well founded, and we hold as a consequence from it that, the contract being void, not only its specific performance cannot be enforced, but that no action will lie in law or equity for damages because of non-performance. But we are nevertheless of opinion that the plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on im-

[1] In Shreve v. Grimes, 4 Litt. (Ky.) 220, 224 (1823), the court says: "In the case of money or property paid to the vendor, for the land itself, when he had only given his promise to convey, and should refuse to fulfil it, as such promise is of no avail in law, the price may be recovered back, on the principle that the consideration on which it was paid happens to fail. But, with regard to ameliorations made under such circumstances, they are not designed for the use of the seller. He is not instrumental in causing them to be made, as he is in case of payment of the price. They may or may not be made, at the election of the purchaser; and in searching the principles over, for which an implied assumpsit will lie, we discover not one which would support the action. If the seller can be at all made liable for them, it must be on the principle of equity, that he ought not, when the improvements are delivered over to him, to be enriched by another's loss. It is true, an implied assumpsit will lie for work and labor done for the defendant upon his request and assent, without any fixed price or any express promise to pay; but the labor must be *his*, and the work be done for *him*, and not for another, and the work afterwards happen to become his, before the action can be sustained. We, therefore, conceive that whatever remedy the appellee may have, it is not by an implied assumpsit for work and labor."

In Mathews v. Davis, 6 Humph. (Tenn.) 324 (1845), plaintiff, the vendee under an oral land contract, sued the vendor in assumpsit for "work and labor done and materials furnished," while in possession under the contract of purchase, in putting improvements on the land. In denying the right to recover in assumpsit the court said: "A jury cannot judge of ameliorations and adjust the matter between the parties. Besides if a recovery be had in a court of law at all it must be had for the work, labor and materials, so much as they were worth, as his honor told the jury. But we have seen this is not the criterion of compensation and therefore it is unfit for a court of law, and exclusively a matter to be adjusted in equity."

But if assumpsit were a possible remedy for improvements put upon land by the vendee, the action would not lie if he had not been turned out of possession, and still enjoys the benefits of them.—Miller v. Tobie, 41 N. H. 84 (1860).

proving property which the ancestor of the defendants encouraged him to expect should become his own, and by the act of God, or by the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury. Baker and Wife v. Carson, 1 Dev. & Bat. Eq. Rep. 381. If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property.

The court therefore directs that it be referred to the clerk of this court, to inquire and report what is the additional value conferred on the land in question by the improvements of the plaintiff, and that he state an account between the parties, charging the plaintiff with a fair rent since the death of Andrew Griffin, and crediting him with what has been advanced towards payment for said land, and with the amount of the additional value so conferred upon it.

Per CURIAM decree accordingly.

RHEA v. ALLISON ET AL.

3 HEAD (TENN.) 176.—1859.

THE complainant purchased from Williams an unimproved lot, in Knoxville, at the price of $400. She paid $60 in cash. The purchase was by parol; but the complainant took possession of the lot, and proceeded to make valuable improvements thereon. Williams afterwards conveyed the same lot to Allison, who instituted an action of ejectment against the complainant to recover the premises. This bill was filed enjoining the action at law, and seeking an account for improvements and the purchase money paid, and asked that the same be declared a *lien* upon the lot. Chancellor LUCKY dismissed the bill. The complainant appealed.

WRIGHT, J.—It is settled in this state that where a man is put in possession of land by the owner, upon an invalid or verbal sale, which the owner fails or refuses to complete, and in the expectation of the performance of the contract, makes improvements, a court of equity will *directly* and *actively*, upon a bill filed by him against the owner for an account, make him compensation to the full value of all his improvements, to the extent they have enhanced the value of the land, deducting rents and profits, and will treat the land as subject to a lien therefor. Herring & Bird v. Pollard's Ex'rs, 4 Hum. 362; Humphreys v. Holtsinger, 3 Sneed 228-230. The same rule must apply to purchase money paid upon the faith of the contract.

These decisions go beyond the doctrine of the English courts,

which only allowed the value of the improvements, upon the ground, either that there was some fraud, or where the aid of the court of equity was *actively* sought by the owner to get possession of the estate. 2 Story's Eq., sec. 1238. Judge Story, and other law writers, speak of it as an implied trust, or lien *upon the estate itself;* while, in other authorities, it is called an *equity.* This equity exists so soon as the improvements are made—attaches itself upon the land—and becomes operative against the owner, or a purchaser from him with notice, actual or constructive. In such a case, the party making the improvements having acted *bona fide* and innocently, the owner, who has received a substantial benefit, ought, *ex aequo et bono,* to pay for such benefit. 2 Story's Eq., secs. 1236-1237. * * * *

If it be true, as defendant, Allison, states in his answer, that Williams had purchased the lot of Deadrick and wife, and that he had to pay $400 to them in discharge of the vendor's lien or mortgage, in order to get a deed, then, if the lot comes to a sale, to that extent he should have priority over complainant in the proceeds. 7 Yer. 168. If, however, the improvements were made upon a part of the lot, the defendant, Allison, being the purchaser of the whole, the sum paid Deadrick and wife will be apportioned ratably, according to value, upon the different parts of the lot.

The decree of the chancellor will be reversed, and the cause remanded to the Chancery Court at Knoxville, where an account will be taken upon the principles of this opinion, to ascertain the amount due complainant, and whether defendant, Allison, is entitled to priority to any, and what extent, in the proceeds of the sale of the lot or piece of ground upon which the improvements were made.[1]

BENDER'S ADMINISTRATORS v. BENDER.

37 PA. 419.—1860.

ASSUMPSIT brought by Jacob Bender against Samuel Rock, administrator, etc., of George Bender, deceased, with notice to the heirs, to recover damages for the breach of an alleged parol contract, made between him and his father, the said deceased, by which it was agreed that a certain tract of land should be devised to the plaintiff. The defendant pleaded *non-assumpsit* and *non-assumpsit infra sex annos.* It appeared from the evidence that, in consideration of this intended devise, the plaintiff was to maintain his father during his life, and pay the other children the sum of $1,000, at the rate of $125 per annum, commencing one year after his father's death, and move from the farm which he then occupied, to that of his father, which he did in 1849 or 1850, where he remained until

[1] *Accord,* Winters v. Elliott, 1 Lea (Tenn.) 676 (1878).

his father's death in 1854; and that during that time he had expended considerable money in improvements on the farm, which was the subject of this alleged bargain. George Bender died intestate, and, on proceedings in partition, had in the Orphans' Court, the farm was adjudged to the plaintiff at the appraisement.

Verdict in favor of the plaintiff for $433.88, and judgment.

LOWRIE, C. J.—By our law this contract, though not put in writing, is not entirely nugatory; but only so far so, that it passes no interest in the land, and cannot furnish any right in law or equity to demand a specific performance. But damages may be recovered for the breach of it. What damages?

Compensation for all that the plaintiff below did in pursuance of the contract, and in satisfaction of his part thereof, and for all permanent improvements made upon the land, in reliance upon the contract, with the knowledge of the defendant, and which the defendant gets the benefit of by taking back the land, deducting the value of the rents and profits of the land during the plaintiff's occupancy.

The making of improvements seems to us a natural consequence of relying on the contract, and the party who witnesses the making of them without objection, and then rescinds the contract, ought to pay for them. Thus we understand the court to have decided. This instruction was objected to here, but we were favored with no argument upon it, and we see no error in it. * * * *

Judgment affirmed.

---

c. BREACH OF CONTRACT.

i. *Plaintiff in Default.*

JENNINGS v. CAMP.

13 JOHNS. (N. Y.) 94.—1816.

THE plaintiff's declaration was in assumpsit, and contained two counts. The first count stated an agreement between the plaintiff and defendant, in the court below, dated the 1st of July, 1812, by which Camp, the plaintiff below and defendant in error, agreed to log up, burn, and clear, fit for sowing, ten acres of land on a certain lot belonging to the defendant below, the plaintiff in error, in a good, farmerlike manner, by the 20th of September, and to fence the said ten acres with a good rail fence by the 1st of October next; and the defendant below agreed to pay the plaintiff at the rate of eight dollars per acre, part to be paid in oxen, etc., and then averred performance.

The second count was a general *indebitatus assumpsit* for work and labor. The defendant pleaded the general issue, and the jury

found a special verdict; namely, "That the plaintiff, in pursuance of the contract and agreement mentioned in the first count, did partly clear the land in that count mentioned, but made none of the fence; and then, of his own accord, default, and negligence, and without any fault, default, or consent of the defendant, abandoned and gave up all further proceedings towards fulfilling the said contract, and hath not yet finished or fulfilled what he undertook to perform by the said contract; and whether, under these circumstances, it is competent and lawful for the plaintiff to put an end to the said contract in the said first count mentioned, and proceed on a general count for work and labor, and to recover the value of what he did in pursuance of said contract, the jury are uninformed, and pray the advice of the court," etc.; and they assessed the plaintiff's damages, on the second count of the declaration, at fifty dollars. The court below gave judgment for the plaintiff, and the cause was submitted to this court without argument.

SPENCER, J.—This case does not present the question whether, on a failure to prove the special contract, in consequence of a variance between the declaration and the proof, the plaintiff may not resort to the general count; but the point is, whether a party who enters into a contract and performs part of it, and then, without cause or the agreement or fault of the other party, but of his own mere volition, abandons the performance, can maintain an action on an implied assumpsit for the labor actually performed; and it seems to me that the mere statement of the case shows the illegality and injustice of the claim.

There are two principles, which are considered well established, precluding the plaintiff below from recovering: 1st. The contract is open between the parties, and still in force; the defendant below has done no act to dissolve or rescind it; and it was decided in Raymond and others v. Bernard, 12 Johns. 274, upon a review of all the cases, that if the special agreement was still in force the plaintiff could not resort to the general counts. 2d. The contract being entire, performance by the plaintiff below was a condition precedent, and he was bound to show a full and substantial performance of his part of the contract; this was so decided in M'Millan v. Vanderlip, 12 Johns. 166. In Cutter v. Powell, 6 T. R. 320, a sailor hired for a voyage took a promissory note from his employer for thirty guineas, provided he proceeded, continued, and did his duty as second mate, from Kingston to Liverpool. Before the arrival of the ship he died; and the court held that wages could not be recovered either on the contract or on a *quantum meruit.* The decision was founded on common-law principles. Lord KENYON said that where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law. ASHHURST, J., very pertinently observed, this is a written contract, and speaks for itself; and as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party

is entitled to receive anything under it; that the plaintiff had no right to desert the agreement and recover on a *quantum meruit;* for wherever there is an express contract the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage.

The case of Faxon v. Mansfield & Holbrook, 2 Mass. 147, is directly in point. Mansfield agreed with Holbrook to erect and finish a barn by a fixed day, when he was to receive $400 in full compensation; he performed part of the work, and left it unfinished, without the consent and contrary to the wishes of Holbrook. PARSONS, C. J., in giving the opinion of the court, said, on these facts, Mansfield could maintain no action, either on his contract or on a *quantum meruit,* against Holbrook; his failure arising not from inevitable accident, but his own neglect.

In Whiting v. Sullivan, 7 Mass. 109, PARSONS, C. J., said, "As the law will not imply a promise where there was an express promise, so the law will not imply a promise of any person against his own express declaration."

In Linningdale v. Livingston, 10 Johns. 36, we recognized a position in Buller's Nisi Prius, "that if there be a special agreement, and the work be done, but not in pursuance of it, the plaintiff may recover upon a *quantum meruit;* for otherwise he would not be able to recover at all." This observation has misled the court below. Correctly understood, it has no application here. It supposes a performance of the contract, with variations from the agreement, probably with the assent of both parties; or it may mean an extension of the time within which the agreement was to be performed, with the like assent. The position never was intended to embrace the case of a wilful dereliction of the contract when partly executed, by one of the parties, without the assent and against the will of the other.

Judgment reversed.[1]

BYRD v. BOYD.

4 McCORD (S. C.) 246.—1827.

THE plaintiff brought suit against the defendant, on a written contract for wages for one year, as overseer. The contract was for $180 for the year. The plaintiff managed the crop well, but in July

[1] In Ketchum v. Evertson, 13 Johns. (N. Y.) 359 (1816), the court says (p. 365): "It would be an alarming doctrine to hold that the plaintiffs might violate the contract and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have." Compare Eldridge v. Rowe, 7 Ill. 91, 95-99 (1845).

he made use of abusive language to the defendant's daughter, for which he was turned away.

Huger, J., who tried the cause, charged the jury that the contract was entire for the year; that if the plaintiff had been properly turned away he ought to recover nothing. If the defendant had turned him off improperly the plaintiff ought to recover the whole amount. The jury found a verdict in favor of the plaintiff for the whole amount of the year's wages. The defendant appealed.

Curia, per Johnson, J.—* * * * When the employer wantonly and without cause turns off his overseer, at a season of the year when it would be impracticable to get employment elsewhere, and his time is wholly lost, I should feel no hesitation in enforcing the rule rigidly, not only as a punishment but as a just remuneration to the overseer; and so when the overseer abandons the employer without cause, or by his neglect inflicts a loss on him commensurate with the services which he has performed, he clearly deserves no compensation.

There is, however, a third class of cases for which it is necessary to provide, and which are perhaps of the most common occurrence. They are those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging of the overseer necessary and justifiable, and that perhaps not immediately connected with the contract, as in the present case. It happens frequently, too, that it becomes a question of great difficulty to ascertain with whom the first wrong commenced. I cannot reconcile it to my notions of natural justice, that the overseer should not recover a compensation for the services, so far as they were directed, and which have been beneficial to the employer. And I am unable to discover any evil which is likely to result from submitting such a matter to the sound discretion of a jury of the country. And as a matter of expediency I should be disposed to establish it as a rule. This conclusion is, I think, supported by the principle of the exception before noticed, and by the common case in which a party is permitted to prove by way of defense, that owing to some defect in the execution of work and labor done and performed, the thing is not worth so much as was stipulated for; and the still more comprehensive principle, that a partial failure of consideration is a good ground of defense. Cases of this description are of very frequent occurrence, and although this question has never been judicially determined, it may be clearly collected from them that the prevailing opinion is favorable to an apportionment. In some cases the jury have found the entire sum, but in most they have apportioned it when the circumstances justified it. Yet the point has never been adverted to by the bench or the bar (*vide* Crawford v. Davis, 2 Const. Rep. 403; Clancy v. Robinson, 2 Const. Rep., and Connelly v. Irby), except in the case of Cox v. Adams, 1 Nott & McCord, 284, which is relied on in opposition to the motion. But by referring to that case, it will be found

that the question was not made, nor is there even a dictum in relation to it.

I am of opinion, therefore, that the case should go back on the ground of misdirection, unbiased by any opinion of the court as to the facts, and it is ordered accordingly.

New trial granted.[1]

BRITTON v. TURNER.

6 N. H. 481.—1834.

ASSUMPSIT for work and labor performed by the plaintiff, in the service of the defendant, from March 9, 1831, to December 27, 1831. The declaration contained the common counts, and among them a count in *quantum meruit* for the labor, averring it to be worth $100. At the trial in the C. C. Pleas, the plaintiff proved the performance of the labor as set forth in the declaration. The defense was that it was performed under a special contract,—that the plaintiff agreed to work one year, from some time in March, 1831, to March, 1832, and that the defendant was to pay him for said year's labor the sum of $120; and the defendant offered evidence tending to show that such was the contract under which the work was done. Evidence was also offered to show that the plaintiff left the defendant's service without his consent, and it was contended by the defendant that the plaintiff had no good cause for not continuing in his employment. There was no evidence offered of any damage arising from the plaintiff's departure, farther than was to be inferred from his non-fulfilment of the entire contract.

The court instructed the jury, that if they were satisfied from the evidence that the labor was performed, under a contract to labor a year, for the sum of $120, and if they were satisfied that the plaintiff labored only the time specified in the declaration, and then left the defendant's service, against his consent and without any good cause, yet the plaintiff was entitled to recover, under his *quantum meruit* count, as much as the labor he performed was reasonably worth; and under this direction the jury gave a verdict for the plaintiff for the sum of $95.

The defendant excepted to the instructions thus given to the jury.

PARKER, J.—It may be assumed, that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of $120, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract. It is clear, then, that he is

[1] Accord, even where the discharge is justified by causes involving the proper performance of the services, Hildebrand v. Amer. Fine Art. Co., 109 Wis. 171 (1901). See explanatory comment on Byrd v. Boyd, supra, in Timberlake v. Thayer, 71 Miss. 279 (1893).

not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in *quantum meruit?* Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled. It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfil the contract by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed, however much he may have done toward the performance; and this has been considered the settled rule of law upon this subject. Stark v. Parker, 2 Pick. 267; Faxon v. Mansfield, 2 Mass. 147; McMillan v. Vanderlip, 12 Johns. 165; Jennings v. Camp, 13 Johns. 94; Reab v. Moor, 19 Johns. 337; Lantry v. Parks, 8 Cow. 63; Sinclair v. Bowles, 9 B. & C. 92; Spain v. Arnott, 2 Stark. N. P. 256.

That such rule in its operation may be very unequal, not to say unjust, is apparent. A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non-performance, which in many instances may be trifling; whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non-fulfilment of the remainder, upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation.

By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action. The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is $95, if the defendant can succeed in this defense he in fact receives nearly five-sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff, a sum not only utterly disproportionate to any probable, not to say possible, damage which could have resulted from the neg-

lect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing toward the fulfilment of his contract.

Another illustration is furnished in Lantry v. Parks, 8 Cow. 83. There the defendant hired the plaintiff for a year, at $10 per month. The plaintiff worked ten and a half months, and then left, saying he would work no more for him. This was on Saturday; on Monday the plaintiff returned, and offered to resume his work, but the defendant said he would employ him no longer. The court held that the refusal of the plaintiff on Saturday was a violation of his contract, and that he could recover nothing for the labor performed.

There are other cases, however, in which principles have been adopted leading to a different result. It is said, that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth. 2 Stark. Ev. 97, 98; Hayward v. Leonard, 7 Pick. 181; Smith v. First Congregational Meeting House in Lowell, 8 Pick. 178; Jewell v. Schroeppel, 4 Cow. 564; Hayden v. Madison, 7 Green 78; Bull. N. P. 139; 4 Bos. & Pul. 355; 10 Johns. 36; 13 Johns. 97; 7 East 479. A different doctrine seems to have been holden in Ellis v. Hamlen, 3 Taunt. 52, and it is apparent, in such cases, that if the house has not been built in the manner specified in the contract, the work has not been done. The party has no more performed what he contracted to perform, than he who has contracted to labor for a certain period, and failed to complete the time. It is in truth virtually conceded in such cases that the work has not been done, for if it had been, the party performing it would be entitled to recover upon the contract itself, which it is held he cannot do. Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it,—elect to take no benefit from what has been performed; and therefore if he does receive, he shall be bound to pay the value—whereas in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract under an expectation that it will be fulfilled, and cannot upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment. But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them.

The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that

the other may eventually fail of completing the entire term. If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house.

Where goods are sold upon a special contract as to their nature, quality, and price, and have been used before their inferiority has been discovered, or other circumstances have occurred which have rendered it impracticable or inconvenient for the vendee to rescind the contract *in toto,* it seems to have been the practice formerly to allow the vendor to recover the stipulated price, and the vendee recovered by a cross action damages for the breach of the contract. "But according to the later and more convenient practice, the vendee in such case is allowed, in an action for the price, to give evidence of the inferiority of the goods, in reduction of damages, and the plaintiff who has broken his contract is not entitled to recover more than the value of the benefits which the defendant has actually derived from the goods; and where the latter has derived no benefit, the plaintiff cannot recover at all." 2 Stark. Ev. 640, 642; Okell v. Smith, 1 Stark. N. P. 107. So where a person contracts for the purchase of a quantity of merchandise, at a certain price, and receives a delivery of part only, and he keeps that part, without any offer of a return, it has been held that he must pay the value of it. Shipton v. Casson, 5 B. & C.; Comyn. Dig. Action F.; Baker v. Sutton, 1 Camp. 55, note. A different opinion seems to have been entertained: Waddington v. Oliver, 5 B. & P. 61, and a different decision was had. Walker v. Dixon, 2 Stark. N. P. 281. There is a close analogy between all these classes of cases, in which such diverse decisions have been made.

If the party who has contracted to receive merchandise, takes a part and uses it, in expectation that the whole will be delivered, which is never done, there seems to be no greater reason that he should pay for what he has received, than there is that the party who has received labor in part, under similar circumstances, should pay the value of what has been done for his benefit. It is said that in those cases where the plaintiff has been permitted to recover there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period, the party for whom the labor is done in truth stipulates to receive it from day to day, as it is performed, and although the other may not eventually do all he has contracted to do, there has been, necessarily, an acceptance of what has been done in pursuance of the contract, and the party must have understood when he

made the contract that there was to be such acceptance. If then the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterward takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed. In neither case has the contract been performed. In neither can an action be sustained on the original contract. In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished. We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the operation of the rule will be to make the party who has failed to fulfil his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. 1 Saund. 320, c; 2 Stark. Ev. 643. It is as "hard upon the plaintiff to preclude him from recovering at all, because he has failed as to part of his entire undertaking," where his contract is to labor for a certain period, as it can be in any other description of contract, provided the defendant has received a benefit and value from the labor actually performed.

We hold, then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it, and where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties. In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done, or furnished, and upon the whole case derives a benefit from it. Taft v. Montague, 14 Mass. 282; 2 Stark. Ev. 644. But if, where a contract is made of such a character, a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." 1 Dane's Abr. 224.

If, on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and

refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done toward the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law cannot and ought not to raise an implied promise to pay. But where the party receives value,—takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. Farnsworth v. Garrard, 1 Camp. 38. And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterward, that does not alter the case,—it has still been received by his assent.

In fact we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that the contract being entire there can be no apportionment; and that there being an express contract no other can be implied, even upon the subsequent performance of service,—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary. Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect. Boone v. Eyre, 1 H. Bl. 273, note; Campbell v. Jones, 6 D. & E. 570; Ritchie v. Atkinson, 10 East 295; Burn v. Miller, 4 Taunt. 745. It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretense for a recovery if he voluntarily deserts the service before the expiration of the time.

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth, or the amount of advantage he receives upon the whole transaction: Wadleigh v. Sutton, 6 N. H. 15; and, in estimating the value of the labor, the contract price for the service

cannot be exceeded. 7 Green. 78; Dubois v. Delaware & Hudson Canal Company, 4 Wend. 285; Koon v. Greenman, 7 Wend. 121. If a person makes a contract fairly he is entitled to have it fully performed, and if this is not done he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the non-performance. The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defense he is entitled so to do, and the implied promise which the law will raise in such case, is to pay such amount of the stipulated price for the whole labor as remains, after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfilment of the contract. If in such case it be found that the damages are equal to, or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover.

This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason; and it will in most instances settle the whole controversy in one action, and prevent a multiplicity of suits and cross actions. There may be instances, however, where the damage occasioned is much greater than the value of the labor performed, and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defense, he is entitled to do so, and may have an action to recover his damages for the non-performance, whatever they may be. Crowninshield v. Robinson, 1 Mason 93. And he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him; but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot afterward sustain an action for farther damages.

Applying the principles thus laid down to this case, the plaintiff is entitled to judgment on the verdict.

The defendant sets up a mere breach of the contract in defense of the action, but this cannot avail him. He does not appear to have offered evidence to show that he was damnified by such breach, or to have asked that a deduction should be made upon that account. The direction to the jury was therefore correct, that the plaintiff was entitled to recover as much as the labor performed was reasonably worth, and the jury appear to have allowed a *pro rata* compensation, for the time which the plaintiff labored in the defendant's service. As the defendant has not claimed or had any adjustment

of damages, for the breach of the contract, in this action, if he has actually sustained damage he is still entitled to a suit to recover the amount.

Whether it is not necessary, in cases of this kind, that notice should be given to the employer that the contract is abandoned, with an offer of adjustment and demand of payment; and whether the laborer must not wait until the time when the money would have been due according to the contract, before commencing an action, 5 B. & P. 61, are questions not necessary to be settled in this case, no objections of that nature having been taken here.

Judgment on the verdict.[1]

VALENTINE, J., IN DUNCAN v. BAKER.

21 KAN. 99, 107.—1878.

THE weight of authority at the present time, we think, is unquestionably against the doctrine that where a contract is entire, and consequently not apportionable, and has been only partially performed, the failing party is not entitled to recover or receive anything for what he has actually done. It will perhaps be admitted that the doctrine has been overturned with respect to all contracts except those for personal services; and if so, then there is not much of the doctrine left. But if the doctrine is to be abandoned with reference to all contracts except those for personal services, then why not abandon the doctrine altogether? The reason usually given is, that the employer in contracts for personal services has no choice except to accept, receive and retain the services already performed, while in other contracts he may refuse to accept, or may return the proceeds of the partially-performed contract, if he choose. But this is not always, nor even generally, true with respect to other contracts. Suppose a miller purchases a thousand bushels of wheat for a thousand dollars, the wheat to be delivered within one month; he receives the wheat as it is delivered, and grinds it into flour; when the vendor has delivered 500 bushels he refuses to deliver any more; what choice has the miller, except to retain what he has already received? This kind of supposition will also apply to the purchase and sale of all other kinds of articles, where the purchaser on receiving them changes their character so that he cannot return them. Or suppose that an owner of real estate employs a man to build or repair some structure thereon for a gross but definite sum, the owner of the real estate to furnish the materials or a portion

[1] See Dean Ashley's "Britton v. Turner," 24 Yale L. Jour. 544.

In Asher v. Tomlinson, 60 S. W. 714 (Ky. 1901), plaintiff, who had contracted to complete certain services at $5 per day, wilfully defaulted, and it was held that his measure of recovery was the contract rate, subject to deduction for the damages sustained by the employer; the court stating this to be the Kentucky rule.

thereof in case of building, and either to furnish them in case of repairing, and the job is only half finished; what choice has the owner of the real estate with reference to retaining or returning the proceeds of the workman's labor? This kind of supposition will also apply to all kinds of work done on real estate, and will often apply to work done on personal property. Of course, in all cases where the employer can refuse to accept the work and does refuse to accept it or returns it, he is not bound to pay for it unless it exactly corresponds with the contract; but where he receives it and retains it, whether he retains it from choice or from necessity, he is bound to pay for the same what it is reasonably worth, less any damage that he may sustain by reason of the partial non-fulfilment of the contract. Of course he is not bound to pay anything unless the work is worth something, unless he receives or may receive some actual benefit therefrom; and where he receives or may receive some actual benefit therefrom, he is bound to pay for such benefit (and only for such benefit), within the limitations hereinbefore mentioned.

Boise, J., in STEEPLES v. NEWTON.

7 Ore. 110, 112.—1879.

The second instruction objected to is as follows: "If the plaintiff abandoned his contract without cause he is entitled to recover the reasonable value of his labor, subject to the offset by the damages sustained by defendant by reason of plaintiff's non-performance of his contract."

The determination of the propriety of this instruction presents a vexed question, on which the authorities are not uniform. The circuit court seems to have followed the rule laid down in the text in Parsons on Contracts, vol. 2, 523, which is supported by the authority of the case of Britton v. Turner (6 N. H. 481), where it was held that where one party, without the fault of the other, fails to perform his contract for labor in such a manner as to enable him to sue upon it, still, if the party for whom the labor is performed has derived a benefit from the part performed, the party so failing may recover the reasonable value of such labor. That was a case of *indebitatus assumpsit* for work and labor. "The defendant offered evidence to prove that the work was done under a contract to work for one year for the sum of one hundred dollars, and that the plaintiff left his service without his consent and without good cause." The learned judge instructed the jury that although all the points should be made out, yet the plaintiff was entitled to recover under his *quantum meruit* as much as the labor performed was reasonably worth, and this instruction was held correct. This case seems not to have been followed in other states. It is quoted and

discussed in the case of Olmstead v. Beal (19 Pick. 529), where the court say that they have no hesitancy in adhering to the rule before established in Massachusetts, which is supported by a long series of adjudications. It was held in the case of Fenton v. Clark, 11 Vt., where the plaintiff contracted with the defendant to labor for four months, at ten dollars per month, and not to receive any pay until he had worked the four months, and before the time was out became disabled and unable to perform the work; that his sickness, being the act of God, the contract was discharged, and he could recover the reasonable value of his labor, and the same was held in the case of Leaver v. Morse, 20 Vt. 620. The same rule is also held in Massachusetts. Fuller v. Brown, 11 Mass. 440, and Olmstead v. Beal, 19 Pick. 529, above cited. The latter rule is as it was announced by this court at this term, in the case of Tuboa & McPhee v. J. M. Strowbridge, where the decision of the question was not necessary to a determination of the case and was consequently *obiter*. "That where one performs services for another on a special contract, and for any reason except a voluntary abandonment, fails to fully comply with his contract and such compliance becomes impracticable, and the service has been of value to him for whom it was rendered, he may recover for such service its reasonable value, after deducting therefrom any damages the party for whom the service was performed has sustained by reason of such failure."

Since deciding that case we have more fully considered this very important subject, and think the rule here laid down to be just and reasonable, and it is supported by most of the modern authorities. To adopt the rule that in all cases a party shall be held to a literal compliance with his special contract before he can recover anything for labor, is too harsh and would often be unjust; and, on the other hand, to hold that the rule as stated in the case of Britton v. Turner, 6 N. H. 481, that a person may voluntarily abandon his special contract and lose nothing thereby, would have a tendency to encourage bad faith and lessen the sacredness of solemn obligations, which it is the duty of the courts to uphold and enforce so far as the same can be done without doing manifest injustice. It would be unjust to require a total performance in cases where the party in default has bestowed his labor for the benefit of his employer and fails fully to comply with the terms of his contract from some accident or misfortune which does not involve wilful neglect or abandonment on his part. We think, therefore, that this instruction of the circuit court was incorrect and might have influenced the verdict of the jury to the damage of the appellant.

SMITH v. BRADY.

17 N. Y. 173.—1858.

THE complaint was for work done and materials furnished upon the land of the defendant, at his request, to the value of $2,295.60. The answer averred that the work done and materials furnished, with the exception of $295.60 charged for extra work and materials, were furnished and done under two agreements therefor, executed by the parties under seal. These were set out in the answer. By them the plaintiff agreed with the defendant to furnish materials and construct for him, and upon his land, three cottages with outhouses and fences. The work was to be done in accordance with certain plans and specifications, except when otherwise provided. It was to be done in the best and most workmanlike manner, and to the entire satisfaction of certain architects who were named in the contract. It was further provided that in case of any extras or omissions in the work, the question between the parties in relation thereto should be submitted to the same architects, and their decisions should be final and conclusive in the matter. For this work which was to be completed before May 1, 1851, the defendant agreed to pay the plaintiff the sum of $4,900, on which a part was to be paid from time to time, as the work progressed, and the balance *"when all the work should be completed and certified by the architects to that effect."*

The trial was before a referee who found that there were omissions and deficiencies in the work and materials which the contracts required to be done and furnished by the plaintiff, and that the loss to the defendant thereby amounted to $212.57; that the plaintiff had done and furnished extra work and materials to the value of $295, and that the defendant, sometime in the month of June, 1851, took possession of the three cottages, without objection at the time, and appropriated the same to his own use. He reported that, after making the proper allowances and deductions to the parties respectively, the plaintiff was entitled to judgment for $1,934.43. The questions of evidence which arose upon the trial, and the manner in which they were disposed of, sufficiently appear in the following opinions. The judgment entered upon the report of the referee was, on appeal, affirmed by the supreme court, at general term in the second district, and the defendant appealed to this court.

COMSTOCK, J.—* * * * We are therefore obliged to consider this question of law, in a building contract, where performance is to precede payment and becomes a condition thereof, can the builder having failed to perform on his part, recover for his work or materials, making to the other party a compensatory allowance for the wrong done to him, it being also a further condition of the question that the employer chooses to occupy and enjoy the erection rather than to remove or require the builder to remove it from his premises?

The right to recover in such a case has never been referred to any doctrine peculiar to such contracts. On the contrary, if we look at the adjudged cases, we shall find that the right, whenever asserted by judicial tribunals, has been supposed to result from a general doctrine applicable as well to other contracts. In Hayward v. Leonard (7 Pick. 181), the action was on a conditional note, to be void if the plaintiff failed to perform an agreement of the same date, by which he undertook to build a house for the defendant of a certain size and in a specified manner. The defense was that the house, although built within the time agreed on, was not in workmanship and materials according to the contract. Chief Justice PARKER said: "The point in controversy seems to be this: whether, where a party has entered into a special contract to perform work for another and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by action on that contract, yet, nevertheless, the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the labor, and on a *quantum valebant* for the materials." He adds: "We think the weight of modern authority is in favor of the action, and that, upon the whole, it is conformable to justice that the party who has the possession and enjoyment of the labor and materials of another shall be held to pay for them, so as in all events he shall lose nothing by the breach of the contract." In that case there were some special facts, but the decision seemed to turn essentially on the general principle suggested in the remarks quoted, and the principle was more emphatically approved by the same court in the subsequent case of Smith v. The First Congregational Meeting House in Lowell, 8 Pick. 178, which was also upon a building contract.

It will be convenient next to cite a case directly opposed which arose in the English Common Pleas, and was tried before Sir JAMES MANSFIELD. Ellis v. Hamlin, 3 Taunt. 52. The action was by a builder against his employer. The defense was, and the evidence supported it, that the plaintiff had omitted to put into the building certain joists and other materials. The plaintiff failing to prove performance of the special agreement resorted to a general count for work, labor and materials, claiming that the defendant, having the benefit of the houses, was bound at least to pay for them according to their value. But Chief Justice MANSFIELD repudiated that doctrine. He said: "The defendant agreed to have a building of such and such dimensions. Is he to have his ground covered with buildings of no use, which he would be glad to see removed, and is he to be forced to pay for them besides? It is said he has the benefit of the houses, and therefore the plaintiff is entitled to recover on a *quantum valebant*. To be sure it is hard that he should build houses and not be paid for them, but the difficulty is to know where to draw the line, for if the defendant is obliged to pay for one deviation from his contract he may equally be obliged to pay for anything

how far soever distant from what the contract stipulated for." The plaintiff was accordingly non-suited; and as the reporter states, the case was never moved again.

The two cases in Massachusetts above cited, and the one before Sir JAMES MANSFIELD, were referred to in Britton v. Turner, 6 N. H. 481. That was a very elaborately considered case. The plaintiff had agreed to work for the defendant for one year, and the defendant was to pay for that labor one hundred and twenty dollars. The plaintiff abandoned his contract without cause before the year was out. It was nevertheless held that he could recover as much as the labor was reasonably worth, there being no evidence of any special damages sustained by the defendant in consequence of the non-performance of the contract. The two cases in Massachusetts were cited with approbation by the court, while that before Chief Justice MANSFIELD was necessarily disapproved. In referring to that class of cases arising on building contracts, it was observed that such cases could not be distinguished from the one then under consideration "unless it be in the circumstance that when a party has contracted to furnish materials and do certain labor, as to build a house in a specified manner, if it is not done according to the contract the party for whom it is built may refuse to receive it, elect to take no benefit from what has been performed, and therefore if he does receive it he shall be bound to pay the value, whereas in a contract for labor merely, from day to day, the party is continually receiving the benefit of the contract under an expectation that it will be fulfilled, and cannot upon the breach of it have an election to refuse to receive what has been done, and thus discharge himself from payment." "But we think," the court proceed to say, "this difference in the nature of the contracts does not justify the application of a different rule in relation to them." "There was just as much reason," it was added, "why the employer should pay the reasonable worth of what has been done for his benefit as there is when he enters and occupies the house which has been built for him but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house." There are few cases to be found in the books more consistently reasoned than this one in the supreme court of New Hampshire, although the decision stands directly opposed to the settled law of this state. I have referred to it, as well as the Massachusetts cases, somewhat at large, in order to show that the supposed liability of a person who enters and occupies a building erected on his ground to pay the builder, although the latter failed in performing his contract, has always been referred to the general doctrine that benefits received and retained under a contract must be paid for without regard to the conditions of the contract itself. I am confident that no case can be found in which the building contractor's right to recover has been maintained on the ground that

the owner, by the mere possession and occupancy of the building, has waived the condition of performance.

The true inquiry then is, whether there is in the law of contracts in general any such doctrine as that upon which the cases referred to in New Hampshire and Massachusetts were determined. To those cases others might be added proceeding essentially on the same ground; yet the rule, I think, is quite well settled the other way. It is certainly so in this state. McMillan v. Vanderlip, 12 Johns. 165; Thorp v. White, 13 id. 53; Jennings v. Camp, id. 94; Champlin v. Rowley, 13 Wend. 258; s. c. in error, 18 id. 187; Paige v. Ott, 5 Denio 406; Pike v. Butler, 4 Comst. 360; Pullman v. Corning, 5 Seld. 93. Among these cases, Champlin v. Rowley may be referred to as a decisive determination of the question. The action was to recover the price of hay sold and delivered. The plaintiff had agreed to deliver to the defendant one hundred tons of pressed hay between the date of the contract and the close of navigation on the Hudson river, $100 to be paid in advance and the residue when the whole should be delivered About fifty tons were delivered before the navigation closed, when the further delivery was interrupted. The defendant sold or used the quantity which he received under the contract. The $100 due in advance having been paid, it was held by the supreme court that entire performance was the condition of any further payment, and therefore that the plaintiff could not recover. The case was very carefully considered, on error, in the court of last resort, where the judgment was affirmed. The case cited in the Supreme Court of New Hampshire was referred to, and that, as well as the class of cases to which it belongs, were expressly overruled. Indeed, in this state the sanctity of contracts, in this respect at least, has been steadily maintained, and no encouragement has ever been given to that loose and dangerous doctrine which allows a person to violate his most solemn engagements and then to draw the injured party into controversy concerning the amount and value of the benefits received.

I think the principles which have with us been so uniformly asserted should have a peculiar application in contracts like the one under consideration. I suppose it will be conceded that every one has a right to build his house, his cottage or his store after such a model and in such style as shall best accord with his notions of utility or be most agreeable to his fancy. The specifications of the contract become the law between the parties until voluntarily changed. If the owner prefers a plain and simple Doric column, and has so provided in the agreement, the contractor has no right to put in its place the more costly and elegant Corinthian. If the owner, having regard to strength and durability, has contracted for walls of specified materials to be laid in a particular manner, or for a given number of joists and beams, the builder has no right to substitute his own judgment for that of others. Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made

as good a building as the one he engaged to erect. He can demand payment only upon and according to the terms of his contract, and if the conditions on which payment is due have not been performed, then the right to demand it does not exist. To hold a different doctrine would be simply to make another contract, and would be giving to parties an encouragement to violate their engagements, which the just policy of law does not permit.

Cases of this kind must not be confounded with others having, perhaps, a slight resemblance but no real analogy. No doubt a person may voluntarily accept a benefit under a contract of which the conditions precedent have not been performed by the other party, and he may do this in such circumstances that a new obligation to pay for the benefit will arise. Thus, if A. should agree to manufacture and deliver to B. a carriage of a particular kind and should make a different one, B. may elect whether he will take it or not. Until he so elects, he has no property in the fabric. If he voluntarily accepts the article, he thereby either waives the objections which he might make to it and is liable to pay for it according to his contract, or a new assumpsit arises from the act of acceptance as though no previous agreement had existed. The case cited on the argument of Vanderbilt v. The Eagle Iron Works, 25 Wend. 665, was determined very distinctly upon these principles.

But the rule, as it is well settled with us, allows a party to retain without compensation the benefits of a partial performance, where, from the nature of the contract, he must receive such benefits in advance of a full performance, and by its terms or just construction he is under no obligation to pay until the performance is complete. Thus, if a person engages to perform a year's labor for another and payment is to be made when the labor is done, in such a case the employer necessarily receives the benefit of each day's service when it is done, yet if the laborer without just cause, abandons the service at any time, however short, before the year has expired he can recover no part of his wages. (Cases, *supra.*) So the contract may be to sell and deliver goods at different times, to be paid for when the whole are received. If the vendor refuses to perform entirely without good cause, the purchaser is neither bound to pay for nor to return the goods received in part performance. Champlin v. Rowley, *supra.* If A. should agree to plow a field of B., consisting of twenty acres, at a given price for the whole service, or at so much per acre, to be paid when the service is done, and after plowing nineteen acres should abandon the contract, he can recover nothing for his work. The owner of the field may enter, sow it with grain and reap the harvest, thus enjoying fully the benefits of the part performance. In so doing he waives nothing; because he cannot reasonably do otherwise. He is not obliged to abandon his field in order to be enabled to insist upon the condition of the contract. Closely analogous is the case of a building contract. The owner of the soil is always in possession. The builder has a right to enter only for the special purpose of performing his

contract. Each material as it is placed in the work becomes annexed to the soil, and thereby the property of the owner. The builder would have no right to remove the brick or stone or lumber after annexation, even if the employer should unjustifiably refuse to allow him to proceed with the work. The owner, from the nature and necessity of the case, takes the benefit of part performance, and therefore by merely so doing does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of conditions precedent from the mere use and occupation of the building erected, unattended by other circumstances, is unreasonable and illogical because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance. To be enabled to stand upon the contract he cannot reasonably be required to tear down and destroy the edifice if he prefers it to remain. As the erection is his by annexation to the soil he may suffer it to stand, and there is no rule of law against his using it without prejudice to his rights.

The present case was evidently tried upon an erroneous theory of the law. Although partial payments were to be made as the work proceeded under the contracts, yet the consideration and condition of those payments was the performance of the work according to the plans and specifications, and in the best and most workmanlike manner, and the final payments were not to be made until after all the work was completed and certified by the architects. Although the contracts were not performed, the plaintiff has recovered all the instalments, less the sum which the referee allowed as damages for the non-performance. In receiving the evidence as to the value and strength of the buildings, notwithstanding non-performance of the contracts, evidence which could have no bearing except upon the question of damages, it is manifest that he proceeded upon views of the law in such cases which I have endeavored to show are unsound.

It is not necessary to give any opinion upon the question whether the referee might properly find upon the evidence that the defendant waived the conditions of the contract by any express approval of the work, or by any other interference or conduct on his part. We only say that, according to the settled law of this state, the plaintiff cannot recover the payments which by the terms or true construction of the contract are due only on condition of performance by him, unless he can show such performance or prove that it has been waived. And the law does not adjudge that a mere silent occupation of the building by the owner amounts to a waiver, nor does it deny to him the right so to occupy and still insist upon the contract. The question of waiver of the condition precedent will always be one of intention to be arrived at from all the circumstances, including the occupancy.

To conclude, there is, in a just view of the question, no hardship in requiring builders, like all other men, to perform their contracts in order to entitle themselves to payment, where the employer has

agreed to pay only on that condition. It is true that such contracts embrace a variety of particulars, and that slight omissions and inadvertences may sometimes very innocently occur. These should be indulgently regarded, and they will be so regarded by courts and juries. But there can be no injustice in imputing to the contractor a knowledge of what his contract requires, nor in holding him to a substantial performance. If he has stipulated for walls of a given material and with a hard inside finish, he knows what he is to do and must perform it. If he has engaged for a given number and size of windows, joists, beams and sills, he cannot, with the specifications before him, innocently depart from his contract. If he fails to perform when the requirement is plain, and when he can perform if he will, he has no right to call upon the courts to make a new contract for him; nor ought he to complain if the law leaves him without remedy.

The judgment should be reversed and a new trial granted.

All the judges concurred in this opinion.

Judgment reversed and a new trial ordered.[1]

[There was another opinion by HARRIS, J., in which SELDEN, DENIO, ROOSEVELT and PRATT, JJ., concurred.]

FEENEY v. BARDSLEY.

66 N. J. L. 239.—1901.

VAN SYCKEL, J.—This suit was brought by Feeney, the defendant in error, to recover the balance alleged to be due to him upon a building contract. The plaintiff in error relies for reversal upon alleged errors in the charge of the trial court. The trial judge charged that, if the contractor did not substantially comply with the contract, he could not recover. He told the jury that, if a builder contracts to erect a two-story and a half house, and he erects only a one story and a half house, he cannot recover, although he has added value to the owner's property. But, if the contractor has substantially performed his contract, even though he has failed to do so in some minor particulars, he is entitled to recover the contract price, less what will be a fair allowance to the owner to make good the defects in the performance of the contract. The court further charged that, if there was not a substantial compliance with the contract, the jury could find a verdict for the contractor for what the building was reasonably worth, if the owner had accepted the house; but that in determining the question of acceptance it was not sufficient to find that the owner

[1] Accord, Malbon v. Birney, 11 Wis. 112 (1860); Brewer v. Tysor, 3 Jones Law (N. C.) 180 (1855); Sumpter v. Hedges, [1898] 1 Q. B. 673. These were all construction contracts.

was occupying it. It is a house built upon his land, and, unless he tears it down, he must make some use of it, so that the jury must find some positive act on his part showing an intention to accept it. This instruction to the jury is strictly in accordance with the views expressed by Mr. Justice MAGIE in the supreme court in Bozarth v. Dudley, 44 N. J. Law 304, 43 Am. Rep. 373. Since the publication of that decision it has been applied in the trial of similar issues, and it has been cited with approbation in this court in Mackinson v. Conlon, 55 N. J. Law 564, 27 Atl. 930. In this respect there is no error in the charge of the trial court. * * * *

McCLAY v. HEDGE.

18 IOWA 66.—1864.

ACTION on contract. The cause was referred to a referee, who reported that the plaintiff agreed to build for the defendant a barn, shed and corn crib, under a special contract for $105, and to have it completed by a specified time. That the plaintiff "failed to complete the barn by the contract time, and also, failed to do all of said job in good and workmanlike manner," and he specifies certain particulars in which the failure consisted, after which the referee further finds "that it is worth and will cost the sum of $27 to make the work above enumerated good," that is, comply with the contract; that the defendant has paid plaintiff $55 to apply on the $105 (the contract price), leaving due to the plaintiff $23, for which he finds the plaintiff entitled to recover. This report was confirmed, judgment rendered accordingly, and the defendant appeals.

DILLON, J.—1. This cause does not involve much in amount, but yet presents a legal question of the highest importance, and one in relation to which the best jurists and the ablest legal thinkers almost radically differ. It is found by the referee that the plaintiff has not performed *in full* his contract. It is not found that the defendant waived, prevented or dispensed with its performance. Not having performed the special contract, he cannot recover (so all of the authorities agree) on the contract. Eiser v. Weissgerber, 2 Iowa 463, 483, and cases cited; Corwin v. Wallace, 17 Id. 374, referring to previous adjudications of the same case. The controversy is, whether in such a case he may recover as upon a *quantum meruit*. The question was settled in this state by the case of Pixler v. Nichols, 8 Iowa 106, which distinctly recognized and expressly followed the case of Britton v. Turner, 6 N. H. 481. That celebrated case has been criticised, doubted and denied to be sound. It is frequently said to be good equity but bad law. Yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon

principle, however it may be upon the technical and more illiberal rules of the common law as found in the older cases. With the known and natural disposition of courts and juries to disfavor the cause of him who has broken his contract, and yet seeks a recovery, and with the limitation stated in Pixler v. Nichols, the application of this rule will not be found practically to work injustice to the employer or contracting party, who is without fault. This rule will apply to such cases as the one under consideration, a formal acceptance of the work, or an acquiescence in the breach, is not necessarily essential to a recovery. But the defendant contends that the plaintiff can only recover so much of the contract price as remains after deducting what it will cost to make and complete the work as he agreed. Granted. The report of the referee shows that he recognized this rule by deducting from the contract price what it was worth and would cost to complete the contract work. * * * *

Affirmed.[1]

TIPTON v. FEITNER.

20 N. Y. 423.—1859.

APPEAL from the Supreme Court. Action to recover the price of certain slaughtered hogs, sold by the plaintiffs to the defendant. It was defended on the ground that they were purchased under a special contract with the plaintiffs, which had been violated on their part. The case, according to the finding of the referee, before whom it was tried, was as follows: On the 3d day of February, 1855, at the city of New York, the plaintiffs agreed with the defendant, by parol, by one and the same contract, to sell the defendant eighty-eight dressed hogs, then at the slaughter-house of a third person, in the city, at 7 cents per pound; and also certain live hogs of the plaintiffs, which were being driven, and were then on their way from the state of Ohio to New York, at 5¼ cents per pound live weight, the defendant agreeing on his part to buy the dressed and live hogs at these prices. The dressed hogs were to be delivered immediately after the sale, and the live ones on their arrival at the city, where they were expected, and did arrive some days afterward. The dressed hogs were delivered on the same day, but were not paid for by the defendant. The live hogs arrived five days afterward; they were not delivered to the defendant, but were slaughtered by the plaintiffs, and by them sold to other parties. The defendant insisted that the plaintiffs could not re-

[1] In Gillis v. Cobe, 177 Mass. 584, 592 (1901) it seems that where a contractor, when acting in good faith, has defaulted on a building contract, and not substantially performed it, he may recover the amount by which the value of the land has been enhanced by the incomplete building. The case reviews the Massachusetts authorities.

cover for the dressed hogs, on the ground that they had failed to perform their agreement as to the live ones. The referee, however, held that the plaintiffs were entitled to recover the price of the dressed hogs, deducting the damages which the defendant had sustained for the breach of the other branch of the contract; and he reported accordingly. The dressed hogs came to $1,182.57; deducted for defendant's damages, $401, leaving $780.38, for which judgment was given, which was affirmed at a general term. The defendant appealed.

SELDEN, J.—It is said that the plaintiffs cannot recover for the dressed hogs actually delivered, because they failed to deliver the live hogs on their arrival in New York, the delivery of the latter being, as it is insisted, a condition precedent to the right of the plaintiffs to claim payment for the former. This consequence is supposed to follow, from the finding of the referee that the plaintiffs agreed to sell both live and the dressed hogs "in one and the same contract."

But it by no means follows, because a party has agreed to do several things by one and the same contract, that performance of the contract in all its parts is a condition precedent to any right to claim payment for the portion which may have been done. Were this so, there could be no such thing as "independent covenants" in any contract. It is always a question of construction, depending upon the terms of the contract, its subject matter, and the circumstances under which it was made, whether there is a condition precedent or not. There are certain well-established legal principles which seem to me decisive of this question in the present case. It is plain of itself and well settled by authority, that when by the terms of a contract a payment by one party is to precede some act to be done by the other, then the performance of the act cannot be treated as a condition of the payment; as in the case of contracts for the sale and conveyance of lands, where payments are to be made before the time fixed for the conveyance.

Again, it is equally well settled, that where, upon the sale of goods, no other time is fixed, payment is to be made when the goods are delivered; and the vendor is under no obligation to deliver them without such payment. There is nothing in the present case which is at all indicative of an intention to give a credit to the defendant. If the contract had been to deliver articles of a perfectly homogeneous nature at different times, but at a uniform price, there might possibly be some ground for holding that the delivery of the whole was to precede any payment for the portion delivered. But even in that case, the authorities show that there must be something in the terms of the contract, from which the intention to make the delivery of the whole a condition, may be implied.

Thus, in the case of Withers v. Reynolds, 2 Barn. & Adol. 882, where the agreement was to supply the plaintiff with wheat straw of good quality, sufficient for his use as stable-keeper, and delivered

on his premises, at the rate of three loads in a fortnight, up to a certain period, at the price of 33s. per load of thirty-six trusses; the plaintiff agreeing to pay for each load at that rate, it was held that the plaintiff was bound to pay for the loads as they were delivered. All the straw was to be delivered, in that case, under "one and the same contract;" and, moreover, the defendant had positively agreed by that contract, to supply the plaintiff with straw for a certain length of time—an agreement which he refused to fulfil; and yet it was held that performance in this respect was not essential to his right to claim payment for the straw actually delivered.

As the effect of a condition precedent is to prevent the court from dealing out justice to the parties according to the equity of the case, it is not surprising that we find it so frequently said that constructions productive of such conditions are not to be encouraged. Parties must be held strictly to their contracts; and where they have agreed in terms or by plain implication to a condition which is to bar them of a recovery according to what is equitable and just, they must abide by the consequences. But courts are to see that such was the intention of the parties, before they are held up to so rigid a rule.

The contract in this case, although "one and the same," is by no means indivisible. On the contrary, it consists of two distinct parts, having no necessary connection, except that they were made at the same time. Each portion of the contract is complete of itself without reference to the other. On what, then, are we to predicate an assumption, that its separate branches were intended to be dependent upon, rather than independent of each other?

The implication must be plain and unmistakable to justify such a conclusion, as its effect would be to impose upon the plaintiff a heavy penalty or forfeiture. If the time for the delivery of the live hogs had been definitely fixed, it might be more reasonable to suppose that the plaintiffs were to wait for payment for the dressed hogs until that time. But the former had not arrived; their arrival might be delayed; they might never arrive; and yet the conclusion contended for supposes the plaintiff to have consented to give this indefinite kind of credit for a marketable article, which would have commanded the money any day at the market price.

It is urged that the referee, by finding that the whole agreement was by "one and the same contract," has virtually found that the contract was entire and indivisible, and that this finding settles the question. But whether the contract was indivisible or not, the terms of the contract being given, it is a question of law, upon which the finding of the referee is not conclusive. Such, however, is not the true construction of the finding. It evidently is not the construction put upon it by the referee himself, because he held that the plaintiffs could recover. All that is meant by the finding is, that the whole agreement, consisting of different parts, was made at one and the same time.

In my view the contract was plainly divisible, and the judgment of the Supreme Court should therefore be affirmed.

DENIO, J.—[In concurring said] * * * * There is another class arising out of contracts for services, where the party employed agreed to serve for a fixed period, or to execute a particular work, and was to be paid by the week or month, or by some rule adjusted by reference to the separate parcels of the work performed, in which it has been uniformly held—except in one case, where the default was occasioned by the death of the party employed—that the whole of the service must be performed in order to warrant a recovery for any part. (McMillan v. Vanderlip, 12 Johns. 165; Cunningham v. Morrell, 10 id. 203; Jennings v. Camp, 13 id. 94; Reab v. Moor, 19 id. 337; Lantry v. Parks, 8 Cow. 63; Monell v. Burns, 4 Denio 121; Wolf v. Howes, 20 N. Y. 197.) These cases proceed upon the ground that the contracts were entire in the sense that full performance of the services contracted for was, by the agreement of the parties to be made before anything became payable by the employer. On this assumption the principle of law upon which a recovery was denied was perfectly plain. But suppose a contract for a year, the employers agreeing to pay the servant ten dollars at the end of each month, and a part performance and subsequent breach by the servant, the employer being in arrears for several full months. In such a case, I conceive that the servant should be permitted to recover for the wages earned, subject to a *recoupment* of the master's damages for the time covered by the breach. I am ignorant of any principle upon which it could be held that he could not recover anything. It certainly cannot be upon the ground of the non-performance of a condition precedent, for it is absurd to say, that under such a contract, serving the last month was a condition to the payment for the first.[1] In the case of contracts for personal services, the death of the servant, we have seen, would enable his representatives to recover a *pro rata* compensation; but in other cases, as in agreements for the purchase of articles of property to be delivered at different times, a failure to deliver the last parcel, though it should result from an unforseen accident, and though the part not delivered should bear a very small proportion to the value of these already delivered, would, upon the opposite doctrine, preclude a recovery for any part. If parties will be so incautious as to stipulate for a full performance of a contract of this character, as a condition for the payment of anything, the law will

[1] This doctrine was applied in Walsh v. N. Y. & Kentucky Co., 88 App. Div. (N. Y.) 477 (1903), where the facts were that plaintiff was employed for a year at "a salary of $5,000 per year" to be paid "in monthly installments of $416.66;" that on November 7 plaintiff was lawfully discharged for disobedience of orders in performing his services; that his wages for October had not yet been paid. It was held that he could recover the $416.66 due for October, with recoupment by defendant for damages.

In Mernagh v. Nichols, 132 App. Div. (N. Y.) 509 (1909), the contract was for services for a year, to be paid for "along from time to time." Plaintiff in default was allowed to recover for the services rendered, less defendant's damages. So, too, in Oliver v. McArthur, 158 App. Div. (N. Y.) 241 (1913). See note 8 Mich. L. Rev. 70.

not relieve them; but if they take care to provide for payment upon the delivery of each article or each parcel, or, in the case of services, for periodical payments, they must be permitted to recover for the part which by the terms of the agreement had become payable, upon deducting the damages of the other party in respect to the portion unperformed. * * * *

CATLIN v. TOBIAS.

26 N. Y. 217.—1863.

ACTION for goods sold and delivered.

EMOTT, J.—* * * * The referee states in his report that on the 15th day of March, 1854, the defendant, who was a manufacturer of liniment, made a contract in writing with D. O. Ketchum & Co., who were vendors of glassware, by which they agreed to deliver to him bottles of various sizes for his medicine, at prices which were specified in the contract, and he agreed to take the glassware. Either party failing to perform was to forfeit or to pay $200 to the other. The bottles were to be delivered during the months of April, May and June next ensuing, and the kinds and quantities of bottles to be delivered during each month are specified in the agreement. The agreement is silent as to the time and manner of payment, although it was proved at the trial, without objection, that there was to be a credit of six months. It was also proved that after all the deliveries which the vendors actually made in April, 1854, the defendant gave them his note at six months for an amount which included the price of similar articles which had been sold and delivered to him before this agreement was made, and also a part of the price of the articles delivered in April after the contract. This note was dated April 13, 1854, and seems to have been subsequently paid, but the referee's report is silent in regard to it; nor is there evidence to show that there was any distinct understanding between the parties as to its precise consideration. On the 11th of April the referee finds that D. O. Ketchum & Co. delivered to the defendant sixty-four gross of two-ounce bottles, eighteen gross of ten-ounce bottles, and sixty-two gross of five-ounce bottles. The contract calls for one hundred gross of two-ounce bottles, and twelve gross of ten-ounce bottles, to be furnished in the month of April, but there is nothing in it as to the purchase or sale at any time of any five-ounce bottles. The referee finds that all the bottles thus delivered were received and used by the defendant. After this, on the 14th day of April, 1854, the firm of D. O. Ketchum & Co. was dissolved, and all the assets of the firm, including the contract with the defendant, and any and every claim against him, were assigned to D. O. Ketchum. A short time after this D. O. Ketchum failed, and on the 10th of June, 1854, executed a general assignment for the

benefit of his creditors to the plaintiff. No more bottles were delivered to the defendant after the 11th of April, and the residue of the agreement was not fulfilled by the vendors.

The plaintiff's assignors have, therefore, failed to perform their contract, and assuming, as the referee has done, that all the articles delivered by them to the defendant, of the description specified and called for by the agreement, were delivered under and in performance of it, the question arises whether, upon such a part performance, payment can be recovered for the price or value of the articles thus delivered. The referee held that the defendant was liable to pay for the glass delivered after the making of the agreement, notwithstanding it was not delivered in pursuance of its terms. He did not, however, find or report that the defendant waived the performance of the contract, but only that he accepted and used the articles delivered. He also decided that the defendant's claim for damages for the non-delivery of the glass could not be set up under the pleadings and proof in this action against the plaintiff. To these decisions the defendant excepted.

It will be seen that sixty-two gross of five-ounce bottles were delivered by D. O. Ketchum & Co. to the defendant on the 11th of April, which were not called for by the contract. The report of the referee states that these "were not at all within the contract," which may probably be fairly construed to mean that they were not delivered or received in pursuance of the contract, or as part of the deliveries under it. If this be so, and this finding is not objected to by either party, there can be no reason why the plaintiff should not recover the value of these articles, as upon a separate and distinct sale and delivery to the defendant. If there was such a distinct sale as the referee's finding seems to imply, the vendor's right to recover the price of the vendee does not depend upon their rights or liabilities under the contract of the 10th of March, however the ultimate recovery might be affected or reduced by any counter-claim of the defendant for damages in consequence of a breach of that agreement. If I could find in this case any unequivocal proof of the price or value of the property included in this separate sale, I should have no difficulty in sustaining a recovery against the defendant in this action to that extent. But the referee does not state this price or value, nor is there any evidence of it except in a bill produced at the trial, and stated to have been rendered to the defendant by the present plaintiff after the assignment to him.

The referee held that the plaintiff's recovery could not be mitigated or reduced by the loss or damage sustained by the defendant by the breach of the contract. Without discussing that question I will proceed to consider the case in a broader aspect, and to examine the main question, whether the plaintiff can recover for the price or value of the articles actually delivered by his assignor.

The referee decided that although there had been only a partial performance of the contract, yet the defendant was liable to pay for the articles delivered under it in such part performance, because they

were accepted and used by him. He considered that the deliveries stipulated in the months of April, May and June were to be treated as separate contracts. Even if this were so, the vendors did not perform their contract in respect to the deliveries for the month of April, and the case, after all, stands upon a partial performance only. In Deming v. Kemp, 4 Sand. S. C. R. 147, which is cited by the referee, the original contract was void by the Statute of Frauds, and each separate delivery was, therefore, regarded as a separate sale made upon an independent contract. The same feature exists in the case of Seymour v. Davis, 2 Sand. S. C. R. 239, decided in the same court.

In the present case there was a valid contract between D. O. Ketchum & Co. and the defendant, for the sale and delivery of bottles of specified sizes during three months. The defendant, no doubt, made this contract with a view to the requirements of his business, and for the purpose of being supplied with the articles from time to time as he required them. The vendors failed to perform their part of this agreement, and the court below held that the defendant was nevertheless bound to performance, that is, payment on his part, because he did not return the articles which had been delivered to him. So far as we have any evidence in the case, as to the time and mode of payments, it was not due until after all the deliveries had been made. The contract was entire, and called for an entire performance, and until such performance was made or tendered there was no liability on the part of the defendant. Even if each month's delivery is regarded as a separate contract, still the same principles apply and must control the rights of these parties. Even in that aspect of the case, as I have already said, there has been a breach of the contract by the vendor, and his claim for compensation rests upon mere partial performance. I am unable to see any distinction between such a case and that of Champlin v. Rowley, in the Court of Errors, 18 Wend. 187. The idea of an equitable right of recovery in such cases, which was discountenanced by the chancellor in his opinion there, has found no more favor in the courts of this state subsequently. In Smith v. Brady, 17 N. Y. 173, the principles which control all this class of cases were elaborately considered in this court, and it would be a distinct departure from the doctrine of that case to sustain a recovery for the price of the articles delivered under this contract upon the facts before us in this case. The defendant was not bound to retain the articles delivered to him under the contract in the course of the month of April, or of any other month included within its limits, without using or disposing of them until the contract, or even the month, had expired, to ascertain whether the vendors would perform their agreement. He made his contract to obtain the articles which he was to buy for immediate and constant use, and no one could have demanded or expected that he would not use them as they were required in his business. But if he did not waive the performance of the contract he had a right to insist upon its performance as an

entirety, and when the vendors, without cause or excuse, refused to perform it, he was not bound to return what he had received, nor could he be compelled to pay for a part performance. Such certainly is now the settled doctrine of the courts of this state.

The case of Shields v. Pettee, 2 Sand. S. C. 262, which was cited by the referee in his opinion and on the argument, has no application to the present case. That was a sale of a certain amount of iron as an entirety, all deliverable at once. After the delivery had commenced the vendees found the article not to be such as they had agreed to buy, and they refused to receive any more. They did not, however, return what they had already received, but claimed to retain this, while they refused the residue and still claimed damages for the inferiority in quality of what they retained. The court held that the vendees must either affirm or rescind *in toto*, and that they could not retain a part of the iron sold them and at the same time refuse the residue, and claim damages for its non-delivery. The difference is as plain between this case and that as it is between such a case and one where a vendee accepts an article with his eyes open and thus elects to consider it a performance of the contract, although it is different from what the vendor agreed to make it. If, in the case of the sale of the iron, the vendors, after delivering a part, had unjustifiably refused to deliver the residue, and yet claimed to recover for what they had delivered, or if in the latter case supposed, the vendor had tendered an article which was not according to his contract, and sought to recover its price although the vendee refused to receive it, the cases would be more analogous to the present.

As I see no way of retaining the judgment for the articles sold and delivered independently of the contract, it must be reversed and a new trial ordered in the court below.[1]

RICHARDS ET AL. v. SHAW.

67 ILL. 222.—1873.

MR. JUSTICE SHELDON.—This was an action of assumpsit, to recover for 391 bushels of corn sold and delivered. The declaration contained a special count on a contract for the sale of the corn, and also the common counts. The plaintiff below, Shaw, recovered a verdict and judgment for $115.

The testimony in the case showed a contract on the part of Shaw, made in March, 1867, to sell to Sandford and Seldon Richards 500 bushels of corn at the price of 50 cents per bushel. Shaw delivered only 391.20 bushels of the corn, about thirty bushels of it the last of April, 1867, and the rest in June, 1867. The price of corn on the

[1] "This rule does not affect the principle that where there is to be a single delivery at one and the same time and only part of the goods have been received, the vendee may waive the right to insist upon such delivery and become liable to pay for the portion actually accepted and appropriated." Avery v. Willson, 81 N. Y. 341 (1880).

Now contra to Catlin v. Tobias, cited herein at p. 161, is § 125, subd. 1 of the New York Sales Act.

5th of May, 1867, which the Richards claim to be the time of delivery, was 75 to 80 cents per bushel; and in June, 1867, at the time Shaw delivered all but the thirty bushels, it was 45 to 48 cents per bushel. There seems to be no material contradiction in the testimony, except upon one point, the time of delivery under the contract. Shaw testified that the time of delivery was not fixed by the contract, although he admits that about the first of May was understood to be the time for the delivery of the corn, but that he would not make a positive agreement for the delivery at that time. Sandford and Seldon Richards both testified positively that, by the contract, the corn was to be delivered by the 5th day of May, 1867, and Orin Richards testified that it was to be delivered the first of May. The clear weight of the testimony is, that the time of delivery was fixed by the contract to be by the 5th of May, 1867.

The appellants make two points for reversal of the judgment: First, that the plaintiff below could not recover without showing the completion of the contract under which the corn was delivered. Second, that the verdict is against the evidence. There was a manifest failure on the part of Shaw to complete his contract, yet we are inclined to hold that he was entitled to his action as upon an implied contract, for the portion of the corn he did deliver.

It is a rule, supported by a very respectable weight of modern authority, that, if the vendee of a specific quantity of goods sold under an entire contract, receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and the vendee becomes liable to the vendor for the price of such part; but he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfil his contract. Oxendale v. Wetherell, 9 Barn. & Cressw. 386; Shipton v. Casson, 5 id. 378; Booth v. Tyson, 15 Vt. 515; 2 Story Con., sec. 847; 2 Parsons Con. 668, and cases cited in note; Bowker v. Hoyt, 18 Pick. 555. Although this rule may be a relaxation of the earlier and more generally received doctrine, that the entire performance, on the part of the vendor, of such a contract as the one in question, is a condition precedent to the payment of the price, and the maintenance of an action for its recovery, the rule seems to be a fair and just one, and we are disposed to give it our acquiescence. It seems heretofore to have received recognition by this court. Evans v. Chi. and R. I. R. Co., 26 Ill. 189.

Assuming that the time fixed by the contract for the delivery of the corn was by the 5th day of May, the verdict was manifestly against the evidence.

The damages sustained by the defendants below by the failure to deliver 470 bushels of corn within the time specified by the contract, when corn was worth 75 to 80 cents per bushel, would amount at least to some $117. Defendants had, besides, an undisputed set-off of $40.90. These two items deducted from the contract price of the corn delivered would leave only about $40 due the plaintiff below, instead of $115, as found by the jury.

The judgment must, therefore, be reversed and the cause remanded.

Judgment reversed.

KLUG v. SHERIFFS.

129 Wis. 468.—1906.

This is an appeal from a judgment of the circuit court of Milwaukee county dismissing the plaintiff's complaint. The plaintiff, an artist, contracted with defendant to paint a portrait of his deceased wife, and for such purpose, at plaintiff's request, defendant furnished two photographs, one taken in doors; and the other, a group photograph, taken out of doors, in which she appeared with others. The photographs were furnished for the purpose of aiding plaintiff in the work. It was agreed between plaintiff and defendant that a portrait should be painted from the "outing" photograph for $175, which was done, and the portrait delivered and paid for. A few days after defendant received the portrait, plaintiff wrote him that, without any direction, he had painted a portrait of his deceased wife from the "indoor" photograph, and asked whether defendant desired to see it. Defendant, by letter requested that the second portrait be brought to his house, which was done. The painting was never returned or paid for. This action was brought to recover for goods sold and delivered of the alleged value of $190. The case was tried by the court without a jury, and the court found: "That, * * * * in response to said suggestion so made by said defendant, the plaintiff brought said second portrait to the house of defendant, and upon inquiry as to the price of said second portrait, stated that the same would be one hundred and seventy-five ($175.00) dollars, which price said defendant refused to pay him therefor, and also refused to surrender to him, the said plaintiff, the said portrait, for the reason that said plaintiff had received no instruction, authority, or direction to paint same, and the defendant then and there offered to destroy said portrait, which said plaintiff refused to have done. That at the time of the delivery of said portrait, as aforesaid, said defendant offered to have the picture removed from the frame, which said plaintiff had placed thereon; and, prior to the commencement of this action, the defendant offered and tendered to said plaintiff the frame in which said picture was set, and the plaintiff refused same, and still refuses same; that said defendant has ever since said day held himself in position, and has been ready and willing to return said frame, but said plaintiff refused, and still refuses, to receive the same. That said plaintiff had no authority to paint said second portrait from the photographs in his possession, thus received for the purpose of painting said first portrait, and that the doing of the same was a breach of faith on the part of said plaintiff, and he acquired no property rights or interest in said picture by reason thereof." Judgment dismissing the plaintiff's complaint, with costs, was ordered, from which this appeal was taken.

Kerwin, J.—The facts in this case are substantially undisputed, and the questions of law are: (1) Whether the painting of the second

portrait was an invasion of the so-called "right of privacy"; and (2) whether the painting of the second portrait was a breach of trust, contract, or confidence, and whether the plaintiff acquired any property in the second portrait. [The court then discusses the first question.]

We think the case before us does not turn upon the so-called "right of privacy," but upon contract relations. The plaintiff seeks to recover at law for the alleged value of the picture, upon the ground that he had a property right in it, and that the defendant, by retaining it, became liable as a purchaser. The complaint is to recover for goods, wares, and merchandise sold and delivered to the defendant. The plaintiff, under a contract to paint the portrait, received the two photographs for the purpose of aiding him in the painting of the original picture, which he painted, and was paid for in accordance with the contract. He then undertook without any authority from the defendant to paint the second portrait; and, as he says in his letter to defendant, "decided to risk having one painted, which I should be pleased to have you see, either at your home or mine, as it suits your convenience." There is no claim that plaintiff ever had authority to paint the second portrait, or that defendant ever assented thereto. Under the contract, plaintiff had no right to hold the photographs or use them for any other purpose than to aid him in painting the original picture. No express authority to use them for any other purpose was given, and none can be implied from the nature of the engagement. When the original picture was painted, plaintiff's contract with defendant was performed, and he had no right to retain the photographs for any other purpose. When he undertook to produce another picture from the indoor photograph, he violated his contract with defendant, and such act amounted to a breach of the trust reposed in him under the contract relation existing between them. In Levyeau v. Clements, 175 Mass. 376, 56 N. E. 753, 50 L. R. A. 397, defendant contracted with plaintiff for a certain number of cuts from defendant's dies to be used by defendant in his business. The plaintiff, in addition to the number of cuts contracted for by defendant, printed a certain number extra for his own use without the knowledge of defendant. By mistake, the extra cuts or folders were delivered, with the others, to defendant, which was immediately discovered, and demand made upon defendant for them, which was refused. Defendant kept the extra cuts not ordered, and used them the same as the others. In an action of trover, the lower court ruled plaintiff could recover, and the judgment was reversed upon appeal. The court said (page 379 of 175 Mass. and page 736, of 56 N. E., 50 L. R. A. 397): "The plaintiff had no right to use the dies to have impressions of them printed for his own use, and his use of them in having 80 extra copies of the folder struck off for himself, for the purpose of advertising his own business of making dies, was a breach of trust toward the defendant, which would have entitled the latter to have,

at least, if the matter were of sufficient consequence, an injunction to restrain the plaintiff from using the folders thus wrongfully obtained, and to a decree ordering them to be destroyed." In Tuck & Sons v. Priester, L. R. 19 Q. B. Div. 629, the plaintiffs employed defendant, who was a printer in Berlin, to make for them copies of a drawing. Defendant made the copies ordered, and also, without the knowledge or consent of plaintiffs, made other copies, and imported them to England. It was held that there was an implied contract that defendant should not make any copies of the drawing other than those ordered by plaintiffs, and that plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract. In Pollard v. Photographic Co., L. R. 40 Ch. Div. 345, a photographer who had taken a negative likeness under agreement to supply the person with copies was restrained from selling or exhibiting copies, on the ground that there was an implied contract not to use the negative for such purpose; and, further, because such sale or exhibition was a breach of confidence. In Prince Albert v. Strange, 2 De Gex & S. 652, it was held that, where a workman intrusted with copperplates for the purpose of taking impressions for the plaintiff of etchings made by the latter, and not intended for publication, took impressions for himself, in violation of the trust, and sold the impressions to the defendant, who published a catalogue of them, accompanied by remarks of his own, the plaintiff was entitled at the hearing to a perpetual injunction to restrain the publication of the catalogue, and to a decree ordering the impressions to be destroyed. We think the doctrine of the above cases rules the case before us, and that plaintiff had no right to paint the second picture or use the photographs for such purpose. The plaintiff, being guilty of a breach of contract, and of trust and confidence as well in painting the second portrait, could acquire no property in it, and therefore had none to sell to defendant or any one else.

It follows that the plaintiff was not entitled to recover.

The judgment of the court below is affirmed.

Dodge, J. (dissenting).—No rule is more elementary than that one who knowingly accepts and avails himself of services performed by another is bound by implied promise to pay for such services although neither requested nor authorized in advance. Wheeler v. Hall, 41 Wis. 447, 451; Wellauer v. Fellows, 48 Wis. 105, 4 N. W. 114; Goodland v. Le Clair, 78 Wis. 176, 47 N. W. 268; Williams v. Williams, 114 Wis. 79, 84, 89 N. W. 835; Manitowoc Steam Boiler Co. v. Manitowoc Glue Co., 120 Wis. 1, 8, 97 N. W. 515; Indiana Mfg. Co. v. Hayes, 155 Pa. 160, 26 Atl. 6; Bartholomae & Co. v. Paull, 18 W. Va. 771; Ford v. Ward, 26 Ark. 363; Abbot v. Hermon, 7 Maine 118. Here the plaintiff painted the picture in question, knowing that defendant would not thereby be placed under any liability, but would have the right after its completion to avail himself of the

service or reject it. At defendant's request it was placed in his possession to enable him to decide whether he would reject or would accept it, with complete understanding that plaintiff expected payment in the latter event. Defendant has retained it. He cannot now be heard to say that he did not expect to pay for it. His acts give him full benefit of plaintiff's work, and he should not, by his own testimony to a mental state of disapproval, be permitted to deny the legal effect of such acts. He could have refused or surrendered the picture, if dissatisfied, with no prejudice to any so-called "rights of privacy," as they existed before plaintiff, at defendant's request, put it in the latter's possession. The cases cited in the court's opinion, Levyeau v. Clements, Tuck v. Priester, Pollard v. Photographic Co., and Albert v. Strange, clearly have no relevancy. In them the plaintiff was attempting to acquire advantage to himself in breach of the understanding under which he had acquired an opportunity to do so. His motive was bad; approximately fraudulent. Here, on the contrary, plaintiff was attempting to confer a benefit upon defendant; in good faith believing that the latter's desire for a picture of his deceased wife would be best satisfied by the service rendered and tendered for acceptance or rejection by the latter. I think plaintiff is entitled upon the facts to recover the reasonable value of the benefit conferred on defendant, and therefore must dissent from the court's decision.[1] * * * *

---

ii. *Defendant in Default.*

DERBY AND OTHERS v. JOHNSON AND OTHERS.

21 VT. 17.—1848.

BOOK account. Plaintiffs contracted to perform for defendants the stone work, masonry and blasting on three miles of railroad at certain prices by the cubic yard. After plaintiffs had worked one month, defendants directed and requested plaintiffs to abandon further execution of the contract and they did so. Plaintiffs presented an account for labor and materials in the prosecution of the work performed. Judgment in county court for plaintiffs.

HALL, J.—* * * * Treating the plaintiffs as having been prevented from executing their part of the contract by the act of the defendants, we think the plaintiffs are entitled to recover, as upon a *quantum meruit,* the value of the services they had performed under it, without reference to the rate of compensation specified in the contract. They might doubtless have claimed the stipulated compensation, and have introduced the contract as evi-

[1] See Professor Costigan's comment on this case, 19 Green Bag, 124.

dence of the defendants' admission of the value of the services. And they might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding; and they might well do so; for it doubtless continued binding on the defendants. But we think the plaintiffs, upon the facts stated in the report of the auditor, were at liberty to consider the contract as having been rescinded from the beginning, and to claim for the services they had performed, without reference to its terms.

The defendants, by their voluntary act, put a stop to the execution of the work, when but a fractional part of that which had been contracted for had been done, and while a large portion of that which had been entered upon was in such an unfinished condition, as to be incapable of being measured and its price ascertained by the rate specified in the contract. Under these circumstances, we think the defendants have no right to say, that the contract, which they have thus repudiated, shall still subsist for the purpose of defeating a recovery by the plaintiffs of the actual amount of labor and materials they have expended.

In Tyson v. Doe, 15 Vt. 571, where the defendant, after the part performance of a contract for delivering certain articles of iron castings, prevented the plaintiff from farther performing it, the contract was held to be so far rescinded by the defendant, as to allow the plaintiff to sustain an action on book for the articles delivered under it, although the time of credit for the articles, by the terms of the contract, had not expired. The court, in that case, say, "that to allow the defendant to insist on the stipulation in regard to the time of payment, while he repudiates the others, would be to enforce a different contract from that which the parties entered into." The claim now made in behalf of the defendants, that the rate of compensation specified in the contract should be the only rule of recovery, would, if sustained, impose upon the plaintiffs a contract which they never made. They did, indeed, agree to do all the work of a certain description on three miles of road, at a certain rate of compensation per cubic yard; but they did not agree to make all their preparations and do but a sixteenth part of the work at that rate; and it is not to be presumed they would have made any such agreement. We are not therefore disposed to enforce such an agreement against them.

The case of Koon v. Greenman, 7 Wend. 121, is much relied upon by the counsel for the defendants. In that case the plaintiff had contracted to do certain mason work at stipulated prices, the defendant finding the materials. After a part of the work had been done, the defendant neglecting to furnish materials for the residue, the plaintiff quit work and brought his action of general assumpsit. The court held he was not entitled to recover the value of the work, but only according to the rate specified. The justice of the decision is not very apparent; and it does not appear to be sustained by the

authorities cited in the opinion,—they being all cases, either of deviations from the contract in the manner of the work, or delays of performance in point of time. But that case, if it be sound law, is distinguishable from this in at least two important particulars. In that case the plaintiff was prevented from completing his contract by the mere negligence of the defendant; in this, by his voluntary and positive command. In that case there does not appear to have been any difficulty in ascertaining the amount to which the plaintiff would be entitled, according to the rates specified in the contract; whereas in this, it is altogether impracticable to ascertain what sum would be due the plaintiffs, at the stipulated prices, for the reason that when the work was stopped by the defendants, a large portion of it was in such an unfinished state as to be incapable of measurement. That case is therefore no authority against the views we have already taken.

The judgment of the county court is therefore affirmed.[1]

HEMMINGER v. WESTERN ASSURANCE CO.

95 MICH. 355.—1893.

McGRATH, J.—Defendant was the owner of a steam barge and a schooner, both sunken in Lake Huron, the one off Sand Beach, and the other off White Rock. On September 2, 1889, it entered into a written contract with Thomas and Medar Isabell, by the terms of which the Isabells were to recover from these vessels everything worth saving, and deliver the same upon the dock at Port Huron, and in consideration the Isabells were to receive one-half of the net amount realized from the sale of the machinery, outfit, and the other things so saved. No time within which this work was to be done was named in the agreement. The Isabells procured the necessary apparatus, commenced the work, and prosecuted it with varying success during that fall. They encountered severe weather, and were compelled several times to abandon the wreck and seek shelter. They continued their work as the weather permitted, until about November 1, but were then compelled to abandon it for that season,

[1]The earliest cases allowing restitution against a defendant in default by breach are Dutch v. Warren, 1 Str. 406 (1721), and Anonymous, 1 Str. 407 (1721). The report of Dutch v. Warren, by Lord Mansfield in Moses v. Macferlan, (reported herein at p. 530) is said to be the more accurate. See 93 Eng. Rep. Full Reprint, p. 598, note 1.

CHARACTER OF THE BREACH. In England it seems to be the rule that plaintiff's quasi-contractual remedy, where defendant has broken the contract, is confined to cases where defendant has clearly repudiated or abandoned the contract, and there are statements in some American cases to the same effect. But by the weight of authority in the United States, the remedy may also be allowed if there is a substantial breach, as by mere failure to perform a vital term of the contract. For discussion and citation of cases, see Williston's Wald's Pollock on Contracts, pp. 339-342, and cases cited therein and Woodward's Quasi-Contracts, § 263, and cases cited therein. Some American jurisdictions allow rescission for breach of warranty in sales and it is allowed by the Uniform Sales Law, (draughtsman's § 69); and see Bogert's New York Sales Act § 150 and notes thereto.

intending to resume it in the spring. They recovered, and delivered, as agreed:

"Two spars and the rigging of these spars, five sails and a lot of running-gear, one tow line, two Atlantic pumps, one windlass, one wheel, one capstan, one lot of eye-bolts and ring-bolts, one set of davits, one set of cat-heads, one anchor and two shots of chain, one compass, one log, one gaff, one air-pump, one stay-sail boom, one heater, one pony-engine, one force-pump, one automatic-pump, one steam-chest head, one cylinder head, a lot of broken castings, a lot of steam pipe, half a ton of gaspipe, one cut-off, one exhaust, one iron bulk-head, one fire-room floor, a lot of fire-grates, and one boiler."

On the 12th day of December, 1889, the defendant sold all the articles recovered except the boiler, and gave a bill of sale of all the wreckage of both vessels remaining therein, to one Thompson. The Isabells assigned to plaintiff.

The declaration counts upon a breach of the contract, and contains counts for labor expended and expenses incurred in and about the prosecution of the work. At the close of the proofs plaintiff elected to recover upon the *quantum meruit,* on the theory that defendant "had violated the contract, and prevented its completion."

The general rule is well settled that a party to a contract where labor is to be performed, upon the breach of that contract by the other party, has two remedies open to him. He may sue upon the contract, and recover damages for its breach, or he may ignore the contract, and sue for services and labor expended, and expenses incurred, from which he has derived no benefit. Kearney v. Doyle, 22 Mich. 294; Mitchell v. Scott, 41 Id. 108; Boyce v. Martin, 46 Id. 240; Shulters v. Searls, 48 Id. 550; Bush v. Brooks, 70 Id. 461; Bromley v. Goff, 75 Id. 218; Moore v. Nail Co., 76 Id. 606. In case he pursues the latter remedy, the measure of damages as to services is not necessarily the contract price, even though the value of the services can be measured or apportioned by the contract rate; but he may recover what his services are reasonably worth, although in excess of the rate fixed by the contract. Hosmer v. Wilson, 7 Mich. 294; Kearney v. Doyle, *supra;* Shulters v. Searls, *supra.* The rule is otherwise, however, where the plaintiff is the author of the breach. The basis of a recovery by one who is in default is an implied agreement arising from the reception of something of benefit or value; but, where the party suing is not responsible for the breach, neither the right nor the amount of the recovery depends upon the measure of benefit received by the party guilty of the breach.

The rule laid down by CHRISTIANCY, J., in Hosmer v. Wilson, *supra,* is that:

"The plaintiff [defendant] having appropriated and received the benefit of the labor (or, what is equivalent, having induced the plaintiff to expend his labor for him, and, if properly performed according to his desire, the defendant being estopped to deny the benefit), a duty is imposed upon the defendant to pay for the labor thus performed."

This disposes of the principal contention in the case. * * * *

Ross, J., in CURTIS v. SMITH et al.

48 Vt. 116, 120.—1875.

The plaintiff had contracted to put in certain wing walls around the bakery of the defendants, at a specified price per yard. Before the time arrived for the plaintiff to commence putting in the wing walls, the defendants notified him not to proceed under the contract, and thereby terminated it. The plaintiff gave evidence which satisfied the jury that before he received the notice terminating the contract, he had done work in quarrying stone to be used in building the wing walls. The stone were not quarried on the land of the defendants, and they received no benefit therefrom. The court allowed the plaintiff to recover for this labor under the common count for labor done and performed. In this we think there was error. The defendants did not contract with the plaintiff for this labor, but for the wing walls completed. The plaintiff, in quarrying stone from his own quarry, was not at work for defendants, but was at work for himself, getting out material that he might or might not use in the erection of the wing walls. The stone when quarried belonged to the plaintiff, and he could put them to any use he saw fit. The plaintiff had performed no labor for the defendants, or that had enured to their benefit under the contract. At most, he had only performed labor with the expectation that he could make it available in enabling him to perform his contract with the defendants. The *gravamen* of his complaint as developed in the evidence is, that he has not been allowed to realize this expectation by reason of the act of the defendants in wrongfully terminating the contract. If he would recover for this, he should declare upon the contract specially, and for the breach thereof of which he now complains.[1]

WELLSTON COAL CO. v. FRANKLIN PAPER CO.

57 Ohio St. 182.—1897.

Minshall, J.—The action below was brought by the Wellston Coal Company to recover of the Franklin Paper Company $333, the difference between the contract price for certain coal delivered by the plaintiff under a contract claimed to have been wrongfully broken by the defendant, and the market price at the time of the deliveries, with interest. The action is not on the contract, but on what, at

[1] Accord, Hosmer v. Wilson, 7 Mich. 294 (1859), where plaintiff contracted to build an engine to order for defendant and the latter countermanded the order after part of the work had been done by plaintiff and upon plaintiff's material.

common law, would be termed a general assumpsit on *quantum valebant*. The facts, about which there is no dispute, are correctly stated in the brief of the plaintiff. On August 7, 1890, plaintiff and defendant made a written contract, by which defendant, for the term of one year, agreed to take its entire supply of coal from plaintiff at the rate of $1.90 per ton of 2,000 pounds, on the cars at Franklin, Ohio, which, after deducting freight, would net the plaintiff $1 per ton. The demand for such coal was greater during the late fall and winter months of each year, when plaintiff's business would be active, and less during the spring and summer months, at which times its business would be dull. The sum of $1 per ton for the coal was the market price, outside of freight charges, for coal of the kind mentioned in the contract, during the summer of 1890, and at the time the contract was made. Plaintiff and defendant were familiar with the ups and downs of the coal trade, and knew that the market price of such coal would be higher during the fall and winter months; and they both understood that defendant would require, for its manufacturing operations during the entire period covered by the contract, a large amount of such coal, which, taken by defendant during all the year covered by the contract, would give plaintiff an assured sale for that amount of coal during the dull season. Such contracts for the year's supply of coal were usually made by manufacturers with coal shippers during the summer, and were advantageous to both parties.

These facts were known to both plaintiff and defendant, who contracted with reference to them; and plaintiff would not have made the contract whereby it agreed to supply coal during the fall and winter months at the contract price, which would be less than the market prices, except for the fact that it would supply the defendant coal at the same price for the balance of the year, when the price would be about the same as the contract price, and, the demand then being small, it would not otherwise be able to sell the coal. During the month of September, 1890, the market price of this coal, outside of freight charges, was $1.05 per ton; and from October 1, 1890, to February 1, 1891, such market price was $1.15 per ton. After February, during the rest of the year covered by the contract, the market price was the same as the contract price. During the period of time from August 1, 1890, to May 13, 1891, when the contract was broken by the defendant, plaintiff furnished defendant, during September and October, 1890, in all, 2,562½ tons of coal, for which it was paid the contract price; while, if the same coal had been sold at the market prices when delivered, plaintiff would have received $333 more for it. About May 13, 1891, defendant wrongfully broke the contract, and refused to take any more coal from plaintiff. The contract did not bind the defendant to take any specified quantity of coal per month, but the average number of tons per month taken before the contract was broken, was 434¼ tons; and, if it had continued to take coal under the contract at the same average number of tons for the balance of May

and the months June and July, the plaintiff would have made a total profit for that time, under the contract, of $304.22.

The question is as to the measure of damages to which the plaintiff is entitled in a case like this. It, as before stated, is not on the contract, but for the value of the coal delivered at the market price, before the contract was wrongly terminated by the defendant, less what had been paid therefor; i. e. the contract price. The plaintiff requested the court to charge the jury that it was entitled to recover, for the coal delivered prior to the repudiation of the contract by the defendant, its market value when the deliveries were made, and is not limited to the price specified in the contract. This the court refused to do, and directed the jury to find a verdict for the plaintiff for nominal damages only. The general rule is that, when full performance of a contract has been prevented by the wrongful act of the defendant, the plaintiff has the right either to sue for damages, or he may disregard the contract, and sue as upon a *quantum meruit* for what he has performed. The plaintiff has pursued the latter course; and it seems well settled, both on reason and authority, that he had the right to do so. 2 Sedg. on Dam. (8th Ed.) 654; Chamberlin v. Scott, 33 Vt. 80; McCullough v. Baker, 47 Mo. 401; Kearney v. Doyle, 22 Mich. 294; Buffkin v. Baird, 73 N. C. 283; U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81; Merrill v. Railroad Co., 16 Wend. 586; Clark v. Mayor, etc., of New York, 4 N. Y. 338.

But it is claimed, on the authority of Doolittle v. McCullough, 12 Ohio St. 360, that the contract price must still be the measure of the plaintiff's recovery. There are many expressions in the opinion in that case that seem to support this view, and much of the reasoning is to the same effect. But all that is there said must be taken as said with reference to the facts of that case. The rule there stated may be regarded as a proper one in a case where, as in that case, it appears from the claim of the plaintiff that the breach of the contract by the defendant worked no loss, but a benefit, to him, on the ground, as appears, that, had he been required to complete the work, he would have suffered a much greater loss; for, if the least expensive part of the work could not have been done without loss, it follows that the doing of the remaining part, under the contract, would have resulted in a still greater loss. The action upon a *quantum meruit* is of equitable origin, and is still governed by considerations of natural justice. Hence, when one has performed labor or furnished material under a contract that is wrongfully terminated by the other party before completion, the question arises whether the party not in fault should be confined to the contract for what he did, or to a *quantum meruit;* and this must depend upon whether the act of the other party in terminating the contract works a loss or not to him, regard being had to the contract. If it works no loss, but is in fact a benefit, as in the case of Doolittle v. McCullough, there are no considerations of justice requiring that he should be compensated in a greater sum for what he did than is stipulated

in the contract. These considerations exercised a controlling influence in the case just referred to. The plaintiff had a contract with the defendant for the making of certain excavations in the construction of a railroad. He was to receive for the entire work 11 cents per cubic yard. He had performed the least expensive part of the work when the contract was wrongfully terminated by the defendant; and on this part, by his own showing, he had suffered a loss. The proof showed that the performance of the remainder, being hard-pan, would have cost him a great deal more. It was then evident, as the court observed, that he had sustained no loss, but a benefit, from the termination of the contract by the defendant.

But in the case before us the facts are very different. They are in fact just the reverse. The contract was for the delivery of coal at a price generally received during the dullest season of the whole year. The defendant received the coal during the season when the market was above the contract price. He had the benefit of the difference between the market and the contract price; but when the dull season arrived, and the advantages of the contract would accrue to the plaintiff, the defendant repudiated it. The difference between the two cases is thus apparent. In the case before us, justice and fair dealing require that the defendant, having repudiated the contract, should pay the market price for the coal at the time it was delivered. In the former case, as the repudiation of the contract by the defendant did not enrich him to the loss of the plaintiff, there were no considerations of justice on which the plaintiff could claim more than the contract price for what he had done under the contract. The object in allowing a recovery of this kind is not to better the condition of the plaintiff under the contract, were it performed, but to save him from a loss resulting from its wrongful termination by the defendant, or, in more general words, to prevent the defendant from enriching himself at the expense of the plaintiff by his own wrongful act. The real test in all cases of a plaintiff's right to recover as upon a *quantum meruit* for part performance of a contract, wrongfully terminated by the defendant, depends upon the consideration whether the defendant is thereby enriched at the loss and expense of the plaintiff. If so, then the law adds a legal to the moral obligation, and enforces it. Keener, Quasi-Cont. 19, and chapter 5, *passim*. And, while the action is not on the contract itself, yet it is so far kept in view as to preclude a recovery by the plaintiff where he would necessarily have lost more by performing the contract, for the consideration agreed upon, than he did by being prevented from doing so. In this view, the case of Doolittle v. McCullough was rightly decided, and, when limited to its facts, may well stand as authority in all similar cases. Judgment of the circuit court and that of the common pleas reversed, and cause remanded for a new trial.[1]

[1]Accord, Connolly v. Sullivan, 173 Mass. 1 (1899); Clark v. Manchester, 51 N. H. 594 (1872).

Restitution by Plaintiff.

OWEN v. BUTTON.

210 MASS. 219.—1911.

RUGG, C. J.—* * * The fourth count of the plaintiff's declaration set forth a sale of a wood business by the plaintiff to the defendant, the consideration for which was the assignment of a note and mortgage and the conveyance of certain real estate and a cash payment with the further allegation of performance by the plaintiff and breach by the defendant in failing to pay the cash and make a valid conveyance of the real estate. The third count was upon an account annexed, certain items of which were for the same property which constituted the subject of sale alleged in the fourth count. At the trial the plaintiff waived the fourth count, and elected to go to trial upon the third count.

The evidence was uncontroverted to the effect that the plaintiff had sold and delivered to the defendant the wood business and the property connected therewith, and had received from the defendant as partial consideration a note and mortgage of some third person, and that the plaintiff had retained this note and mortgage and had collected money due upon it, and had not returned or offered to return it to the defendant before bringing suit. As to other items of property and cash alleged to constitute the consideration for the sale, the evidence was conflicting. But upon the showing made by the plaintiff it is plain that he could not recover upon an account annexed for prop-

LIMITATION OF RECOVERY WHERE PLAINTIFF HAS FULLY PERFORMED. Where plaintiff has fully performed, his measure of recovery is the sum fixed by the contract, and not the reasonable value of what he has done. In Fells v. Vestvali, 2 Keyes 152 (1865), (N. Y. Ct. of Appeals), defendant contended that "the complaint was quantum meruit and that the plaintiff could not recover in an action of quantum meruit by proving an express contract, that there was a fatal variance between the complaint and the proof." The court said: "After the complete performance of an express contract, there is no reason why a recovery may not be had under this form of pleading. The only effect in such a case of proof of an express contract fixing the price is that the stipulated price becomes the quantum meruit in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleading." See also Porter v. Dunn, 61 Hun (N. Y.) 310 (1891); same case, on appeal, 131 N. Y. 314 (1892). For further citations, see 9 Cyc. 685 (note 5), 686 (notes 6-9); 2 Smith's Leading Cases, (8th Amer. ed.) 33; 4 Ency. Pleading and Practice 923 (note 1), 921 (note 1). There seems to be no present valid reason why, if the plaintiff has fully performed, the value of what he ought to have received is allowed to him, while if he has only partly performed, he is allowed the value of that which he has given. See the criticism in Williston's Wald's Pollock on Contracts, p. 337; Keener Quasi-Contracts, p. 301; Woodward Quasi-Contracts, p. 415.

CONTRACT UNDER SEAL. By the weight of authority, the fact that the broken contract was under seal does not prevent the plaintiff from recovering upon a quantum meruit, where the defendant is in default. Weaver v. Bentley, 1 Caines (N. Y.) 47, (1803); Ballou v. Billings, 136 Mass. 307 (1884); Amer. Life Ins. Co. v. McAden, 109 Pa. St. 399. Contra, Western v. Sharp, 14 B. Mon. (Ky.) 178 (1853).

erty sold by way of barter or exchange, where he retained a substantial part of the consideration received. If he intended to revoke the contract by reason of the defendant's breach and seek to recover the value of the property delivered to the defendant on a quantum valebat, it was his duty to put the defendant in the condition in which he was before the bargain by first returning to him the consideration he had received. His failure to do this deprives him of the right to sue except for breach of the contract. Kimball v. Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Bartlett v. Drake, 100 Mass. 174, 176, 97 Am. Dec. 92, 1 Am. Rep. 101; Marston v. Singapore Rattan Co., 163 Mass. 296, 39 N. E. 1113; Croft v. Wilbur, 7 Allen 248; De Montague v. Bacharach, 181 Mass. 256, 63 N. E. 435; O'Shea v. Vaughn, 201 Mass. 412, 420, 424, 87 N. E. 616. The plaintiff relies upon Miller v. Roberts, 169 Mass. 134-146, 47 N. E. 585, but that case is plainly distinguishable for in the case at bar no question of the statute of frauds was raised by the pleadings or at the trial, and the defendant appears to have contended that he had fully performed his part of the contract, and the controversy related chiefly to the terms of the contract.

Some reliance is placed upon the offer of the plaintiff during the trial to return the consideration. But the authorities just cited show that the general rule is that the offer to return the consideration must be made in a case of this sort before action is brought. A return may be made after the institution of the action in instances where the thing returned is as between the parties a mere promise or not property, as for instance a check or note of one of the parties. Morse v. Woodworth, 155 Mass. 233, 249, 27 N. E. 1010, 29 N. E. 525; Illustrated Card & Novelty Co. v. Dolan, 208 Mass. 53, 55, 94 N. E. 299. This is not that exceptional kind of case, but falls within the general rule above stated.

The question as to the validity of the deed of the Connecticut property becomes immaterial.

Exceptions overruled.[1]

[1] In Summerall v. Graham, 62 Ga. 729 (1879), plaintiff, vendee under a land contract, paid part of the purchase price and went into possession. Defendant vendor failed to make title. Plaintiff sued to recover back the purchase price. Bleckley, J., said: "He [plaintiff] still retains that possession. He has not surrendered or offered to surrender it, nor has he been evicted. * * * Restitution before absolution is as sound in law as in theology; and that doctrine prevents an *ex parte* rescission by the plaintiff, without restoring the defendant to his original situation."

WHERE PLAINTIFF HAS RECEIVED MONEY. Where it is money that plaintiff has received, the plaintiff may be allowed to recover the value of benefits conferred on defendant, less the amount of money received by the plaintiff. Wellston Coal Co. v. Franklin Paper Co., reported herein at p. 173.

HUNT v. SILK.

5 EAST (K. B.) 449.—1804.

IN assumpsit for money had and received. On the 31st of August, 1802, an agreement of that date was made between the parties, whereby the defendant, in consideration of 10*l.* *to be paid at the time of executing the lease* after mentioned, and for other considerations therein stated, agreed that within ten days from the date thereof he would grant to the plaintiff a lease of a certain dwelling-house for nineteen years (determinable by the plaintiff in five, ten, or fifteen years) from the 29th of September then next (but possession to be immediately given to the plaintiff), at the yearly rent of 63*l.* And the defendant also agreed at his own expense to make certain alterations in the premises, and that the premises, fixtures, and things should *at the time of executing the lease* be put in complete repair. And the plaintiff, in consideration of the aforesaid, agreed to accept the lease at the rent and in manner aforesaid, and to execute a counterpart, and pay the rent. The plaintiff took immediate possession of the premises under the agreement, and paid the 10*l.* at the same time, in confidence that the alterations and repairs stipulated for would be done within the ten days; but that period and some days after having elapsed, and nothing being done, notwithstanding several applications to the defendant to perform the work, the plaintiff quitted the house, giving the defendant notice of his having rescinded the agreement in consequence of the defendant's default, and brought this action to recover back the money he had paid. Lord ELLENBOROUGH, however, thought that the plaintiff was too late to rescind the contract, and that his only remedy was on the special agreement, and therefore directed a non-suit. Which

Reader now moved to set aside and to have a new trial, on the authority of Giles v. Edwards, 7 T. R. 181.

Lord ELLENBOROUGH, C. J.—Without questioning the authority of the case cited, which I admit to have been properly decided, there is this difference between that and the present; that there by the terms of the agreement the money was to be paid antecedent to the cording and delivery of the wood, and here it was not to be paid till the repairs were done and the lease executed. The plaintiff there had no opportunity by the terms of the contract of making his stand, to see whether the agreement were performed by the other party before he paid his money, which the plaintiff in this case had; but instead of making his stand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waived his right, and voluntarily paid the money; giving the defendant credit for his future performance of the contract, and afterward continued in possession notwithstanding the defendant's default. Now where a contract is to be rescinded at all, it must be rescinded

in toto, and the parties put *in statu quo.* But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of; the parties cannot be put in *statu quo.*[1]

GROSE, J., of the same opinion.

LAWRENCE, J.—In the case referred to, where the contract was rescinded, both parties were put in the same situation they were in before. For the defendant must at any rate have corded his wood before it was sold. But that cannot be done here where the plaintiff has had an intermediate occupation of the premises under the agreement. If indeed the 10*l.* had been paid specifically for the repairs, and they had not been done within the time specified, on which the plaintiff had thrown up the premises, there might have been some ground for the plaintiff's argument that the consideration had wholly failed; but the money was paid generally on the agreement, and the plaintiff continued in possession after the ten days, which can only be referred to the agreement.

LE BLANC, J.—The plaintiff voluntarily consented to go on upon the contract after the defendant had made the default of which he now wishes to avail himself in destruction of the contract. But the parties cannot be put in the same situation they were in, because the plaintiff has had an occupation of the premises under the agreement.

Rule refused.[2]

[1] The expression "'rescission of contract' sometimes means the annulment of the agreement for mistake or fraud or some other defect in an essential requisite. It sometimes means the extinguishment of the contract by mutual agreement. But in this connection, it signifies the right of one party to put an end to a contract on account of a substantial breach of it by the other party." Brantly, Contracts, 2d ed. § 198. Further, on the various uses of the word recission, see 7 Col. L. Rev. 123; and for a criticism of its use where defendant has broken the contract, see Lord Bowen's comment in Mersey Steel and Iron Co. v. Naylor, 9 Q. B. D. 648, 671.

[2] In De Montague v. Bacharach, 181 Mass. 256 (1902), plaintiff claimed to have obtained the right from defendant to run a restaurant for two years in a basement, part of which was occupied by defendant's bar. After ten months defendant refused to allow him to use the basement any longer, and plaintiff sued to recover back what he had thus far paid. The court said: "The second ground on which the plaintiff seeks to keep his verdict is that, on the breach of the contract by the defendants, he was entitled to rescind the contract and recover from the defendants what he paid under it. But as was said in Handforth v. Jackson, 150 Mass. 149, 154, 22 N. E. 634, in case a plaintiff wishes to rescind, the defendant is 'entitled to have his property restored to him, not to have its value fixed by a jury'; and it is settled that a plaintiff cannot rescind a contract on the defendant committing a breach of it, without putting the defendant in *statu quo.* Leonard v. Morgan, 6 Gray 412; Bassett v. Percival, 5 Allen 345; Handforth v. Jackson, 150 Mass. 149, 22 N. E. 634; Marston v. Curtis, 163 Mass. 296, 302, 39 N. E. 1113; Gassett v. Glazier, 165 Mass. 473, 480, 43 N. E. 193. In the case at bar the plaintiff had enjoyed the privilege of conducting the restaurant for at least ten months. For that reason he could not put the defendants in *statu quo,* and therefore could not rescind the contract on the defendants committing a breach of it."

REYNOLDS v. LYNCH.

98 MINN. 58.—1906.

START, C. J.—Action in the district court of the county of St. Louis to recover $500 paid by the plaintiff to the defendant as earnest money on a contract giving the plaintiff the option to purchase certain land at the price and within the time stated in the contract. On the trial and at the close of the evidence the trial court instructed the jury to return a verdict in favor of the plaintiff for the amount claimed, and the defendant appealed from an order denying his alternative motion for judgment notwithstanding the verdict or for a new trial. On July 25, 1904, the parties hereto entered into a contract which is designated in the record as Exhibit A, whereby the defendant, in consideration of $500 then paid to him by the plaintiff, granted to the plaintiff an option for ninety days from the date thereof to purchase the land described in the complaint, aggregating some 8,000 acres, for the sum of $7,774.99. The contract provided that if the sale was concluded the $500 should apply on the purchase price. There was, however, no express provision as to the return of the $500 in case the defendant failed to perform the terms of the contract on his part. The defendant agreed as a part of the contract to deliver, at his office, in the city of Duluth, within sixty days from the date of the contract, to the plaintiff, complete abstracts of title of the land with certificates as to taxes and judgments. * * *

The next contention of the defendant is that the agreement to furnish abstracts of the title of the land was an independent covenant, a breach of which gave the plaintiff no right of rescission, his remedy for such breach being an action for damages. The question whether covenants are to be held to be dependent on or independent of each other turns upon the intention of the parties to be ascertained from the subject-matter and terms of their contract. Such intention is paramount to which, when once discovered, all technical forms of expression must yield. 3 Page on Contracts, § 1452; 11 Cyc. 1053. Applying this test to this contract it is clear that the covenant of the defendant to furnish the abstracts within sixty days was not an independent one but an essential and material part of the contract. The subject-matter of the contract was the proposed purchase of a large tract of land by the plaintiff if he so elected within ninety days. He could not intelligently exercise the option without knowing the state of the title to the land. This could only be ascertained by the examination of a large number of abstracts by a lawyer or other competent party. The manifest intention of the parties, as disclosed by their contract, was that the covenant as to furnishing the abstracts was not to be regarded as an independent one, a breach of which might be compensated by an action for damages. Nothing could be more

foreign to the intention of the parties, as disclosed by their contract, than that if the defendant failed to keep his covenant as to furnishing the abstracts the plaintiff nevertheless must either forfeit the $500 paid for the option or consummate the purchase without knowledge whether or not he was getting any title to the land, and content himself with damages for a breach of the covenant if he could establish any. Even if it be conceded that time was not of the essence of the covenant to furnish the abstracts, yet the defendant was bound to furnish them within a reasonable time so that the state of the title could be determined in time to enable the plaintiff intelligently to exercise his option.

It is further urged by the defendant that if the covenant to furnish the abstracts was not an independent one but an essential and material part of the contract, the plaintiff could not rescind because he could not restore what he had received by virtue of the contract. True it is that the plaintiff by virtue of the contract had the option to purchase the land upon the terms therein stated at any time during the ninety days. The argument urged by defendant's counsel in support of his proposition is ingeniously plausible, but it is unsound. The general rule that one who has received substantial benefits from a contract must restore them as a condition precedent to its rescission rests upon the maxim that he who seeks equity must do equity. Clearly then the rule cannot be invoked by the party whose own breach of the contract neutralized the tentative benefits received by the opposite party who cannot return them, and who cannot be adequately compensated for the breach in an action for damages. Now in this case the defendant was bound to sell the land if the plaintiff elected to purchase it within the time limited by the contract. The defendant covenanted that he would, as a condition precedent, furnish abstracts of title to enable the plaintiff intelligently to exercise his option. This condition the plaintiff failed to perform, whereby any tentative benefits received by the plaintiff were neutralized, and he rescinded the contract and demanded the repayment of the money paid for the option. But it is urged that until there was a rescission the defendant was bound by the contract and during that time he lost the right to offer the land for sale and that what he so lost cannot be restored to him. True, but if he had kept his part of the contract he would either have received the balance of the purchase price of the land or the right to retain the $500 paid for the option. Therefore if he loses anything by the rescission it is due to his failure to perform his own covenant. We hold that the plaintiff had a right to rescind the contract and sue for the amount paid by him thereon.

The last claim urged by the defendant is that the plaintiff waived his right to rescind the contract, if any he had, by an unreasonable delay in exercising the right. We have considered this claim and tested it by the record. We are of the opinion that the plaintiff exercised his right to rescind within a reasonable time after the defendant's failure and refusal to furnish proper abstracts of the title to

the land, with judgment and tax certificates in accordance with his covenant so to do.

Order affirmed.[1]

[1] In Campbell Mfg. Co. v. Marsh, 20 Colo. 22 (1894), plaintiff bought of defendant a printing press and folder for $3,000, and made a cash payment of $500. The press was delivered, set up, and used, but defendant failed to deliver the folder. Plaintiff sued for the return of the $500. The court said: "It is urged that as the press had been put in use by appellee, the appellant could not be placed in *statu quo* and hence the former could not rescind. * * * In this case, however, it was in contemplation of the parties that the press should be used pending the delivery of the folder. The evidence shows that it was in fact used only to a very limited extent; that appellees had little or no benefit from such use and that the press was returned in as good condition as when received. It is true that the witnesses testified that it would not sell so well as an unused press, but the rule requiring the seller to be placed in *statu quo* has never, we think, been extended so far as to entitle the party in fault to be saved from all loss."

In Timmerman v. Stanley, 123 Ga. 850 (1905), plaintiff was wrongfully expelled from a business college in which he had paid for two scholarships, and sought to receive back the amount paid. The court said: "Where a person agrees to teach another a certain thing, to qualify him for a certain position, if he gives the student some instruction and then refuses to complete his contract, there would be no possible way by which such instruction as he had given could be returned or tendered back to him; nor is the other party required to estimate value for what has been done and tender such amount. He can not hold on to the amount paid, refuse to proceed with the contract, and defend against an action to recover the price paid on the ground that the plaintiff had not tendered back to him his instruction and could not restore him to the *status quo*." See note on this case, 6 Col. L. Rev. 53.

An extreme case allowing recovery without deduction for benefits received is Ankeny v. Clark, 148 U. S. 345 (1893), where defendant contracted to sell land to plaintiff in consideration of 12,000 bushels of wheat. Plaintiff delivered the wheat but defendant failed to make title. Plaintiff sued to recover the value of the wheat and was allowed to do so, without deducting the value of the use of the land which he had enjoyed for some years while in possession under the contract. The technical reason given for not requiring the deduction was that no action lies for use and occupation except where there is the conventional relation of landlord and tenant (see upon this point, Smith v. Stewart, reported herein, p. 618); accord, Castle v. Armstead, 168 N. Y. App. Div. 466 (1915) 29 Har. L. Rev. 340. Cf. Todd v. Leach, 100 Ga. 227 (1896), where plaintiff built a house upon the land of defendant upon agreement by defendant that plaintiff was to have "the use and occupation of the same for the balance of his life, rent free." Plaintiff built the house and went into possession, but defendant later wrongfully evicted him. Plaintiff then sued for his expense and the value of labor in building the house, and it was held that he must "account for the value of the use" while he was in possession.

VAN WERDEN v. EQUITABLE LIFE ASSURANCE SOC.

99 IOWA 621.—1896.

From the petition it appears that September 19, 1891, the plaintiff paid to the defendant society the sum of $500.40, the same being three annual premiums on a $3,000 bond or policy of insurance on his life, which policy was afterward issued to plaintiff; that on the 19th day of September, 1892, the defendant sent to plaintiff a receipt for $166.80, being the annual premium due on that date; that on September 19, 1893, the defendant demanded of plaintiff the sum of $166.80, being the third annual premium on said policy, which had already been paid, and which plaintiff refused to again pay; and that because of such refusal defendant notified plaintiff that the policy was not in force, and became suspended and avoided because of the nonpayment of the third annual premium. The petition asks to recover the amount originally paid—$500.40—with interest. At the close of the entire evidence plaintiff moved for a verdict in his favor, which the court directed, and from a judgment thereon the defendant appealed. Affirmed.

GRANGER, J.— * * * * IV. It is urged by appellant that the plaintiff having had the insurance two years, there could be no recovery back of the entire premium paid. The court held that plaintiff, if entitled to recover, was entitled to the entire amount paid, with interest. There is a rule that, where the contract has once taken effect, there is ordinarily no law to sustain a recovery of premiums paid. Cooke, Life Ins., § 104; May, Ins., § 567; Bliss, Ins., § 423. In support of the rule are cited Standley v. Insurance Co., 95 Ind. 254; Insurance Co. v. Houser, 89 Ind. 258, and the same case in 111 Ind. 266, 12 N. E. 479.[1] It is observed that the rule as stated is the ordinary one, and the cases supporting the text are generally, if not en-

[1]In Skudera v. Metropolitan Life Ins. Co., 17 Misc. 367 (1896), (N. Y. Supreme Ct., Appellate Term) recovery back of the premiums was denied, the court saying: "Granting that upon the defendant's breach the plaintiff could treat the contract, with regard to each of the policies, as determined, it does not follow that the defendant was bound *ex aequo et bono* to restore the premiums received by it, for which, in part, at least, the plaintiff had had value in the risk assumed by the defendant. Plainly, the plaintiff could not predicate a rescission of the contract of the defendant's breach without restitution by her of what she had received under the contract, and a contract of life insurance being essentially indivisible in point of performance by either of the parties thereto, Cohen v. N. Y. Mut. Life Ins. Co., 50 N. Y. 610, such restitution was in the nature of things impossible. Wharton on Contracts, § 748; Clark on Contracts, 774; Hunt v. Silk, 5 East 783. In a case such as the one at bar, if the insured is unwilling to await the maturity of the policy and then to test its continued vitality, only two remedies are available, the insured may either sue at law for damages for the insurer's breach of contract, or prosecute an action in equity to have the policy adjudged to be in force and the insurer to accept the premium refused. Sutherland on the Meas. of Dam., § 838; Speer v. Phoenix Mut. Life Ins. Co., 36 Hun 323; Day v. Conn. Gen. Life Ins. Co., 45 Conn. 480; 29 Am. Rep. 693; Hayner v. Am. Pop. Life Ins. Co., 69 N. Y. 435; Cohen v. N. Y. Mut. Life Ins. Co., *supra*."

tirely, based on facts as to which there might not have been room for doubt; and the text writers from whom we quote make such distinctions as to render doubtful the application of the rule to the facts of this case. From some language in the latter case, cited from Indiana, it would seem as if the rule there stated might be doubted, as, because of its former application to the case, it is held to be the law of it. But, however that may be, we think the rule for this case quite definitely settled. In Insurance Co. v. McAden, 109 Pa. 399, 1 Atl. 256, the company wrongfully revoked the policy that had run for ten years. The action was to recover the premiums paid, and it was held that there could be a recovery. In that case there had been no advance premiums paid, so that the recovery was sought only for premiums covering the time when the policy had been in force. In the opinion it is said: "In the case at bar the rights of the parties under the contract of insurance had attached, but the plaintiff had never received any actual benefit from it. They may, in some sense, perhaps, be said to have enjoyed the protection which the policy afforded in the event of the husband's death; but, as that event did not occur, the policy had as yet been of no appreciable actual advantage to the plaintiff, and no real disadvantage to the defendant. The parties, for anything that appears, upon the plaintiff's recovery are placed precisely in the same situation that they were before the contract was made; for, although the company had carried the risk, and the plaintiff, Mary A. McAden, at all times during the continuance of the contract, upon the happening of the event provided against was entitled to the indemnity it secured, yet the company has paid nothing and the plaintiffs have received nothing. As in the case of any other contract, the parties were entitled, during its continuance, according to its terms. The policy, when made, was admittedly valid; the premiums which were paid were voluntarily paid upon the policy; the risk had been running for ten years; the obligations of the contract were long since in force on both sides; and it is clear that plaintiffs could not, on their own mere motion, rescind it so as to recover back the premiums paid. But if, after receiving the several premiums, the company, without right, refuses to receive further premiums as they mature, deny their obligation, and declare the contract at an end, the plaintiff, we think, may take the defendants at their word, treat the contract as rescinded, and recover back the premiums paid as so much money had and received for their use." Rescission or avoidance, properly so called, annihilates the contract, and puts the parties in the same position as if it had never existed. And notice that a party will not perform his contract has the same effect as a breach. The latter proposition is supported in Ballou v. Billings, 136 Mass. 307. For the purposes of the question we are considering, the case at bar does not differ, in any essential fact, from the Pennsylvania case. In McKee v. Insurance Co., 28 Mo. 383, it is said: "If the defendant [the company] wrongfully determined the contract by

refusing to receive a premium when it was due, then the plaintiff had a right to treat the policy as at an end, and recover back all the money she had paid under it." In Insurance Co. v. Garmany, 74 Ga. 51, it is said that, if the assured makes defaults in his payments, he forfeits all his payments, with the interest that would have accrued thereon from the time of payment. It then holds that when the company violates the conditions of its contract it is liable to return to the assured as much as he (the assured) would lose because of the breach of the contract. The case holds that, where the company violates its policy, the assured may recover the premiums paid, with interest. The case cites Insurance Co. v. McAden and McKee v. Insurance Co., supra. The rule of those cases has a clear support in Meade v. Insurance Co., 51 How. Prac. 1. That such a rule has ample support on authority is hardly to be doubted. The case at bar, in its facts, is clearly within the rule.

It is urged that the act of the company in avoiding the policy could not affect the right of plaintiff thereon if the facts did not justify the avoidance. That may be true as a legal proposition, but it is held in Insurance Co. v. McAden, supra, that the assured in such a case may take the insurance company at its word, and treat the contract as rescinded. The authorities sustain the rule that in such a case the assured may elect whether to enforce the contract or treat it as rescinded, and recover for the breach. The judgment of the District Court is affirmed.[1]

[1] In Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264 (1884), an equity suit, defendant terminated its business and transferred its assets and policies to another company, and thus put it out of its power to perform. Complainant sued to recover the premiums he had paid, with interest. The court said: "The question remains as to what is justly due the complainant, by reason of the contract being terminated by the act of the company. He demands a return of all the premiums paid by him, with interest, less the amount of his premium note; and that said note shall be delivered up to be cancelled. We do not think he is entitled to a return of the full amount of his premiums paid. He has the benefit of insurance upon his life for five years, and the value of that insurance should be deducted from the aggregate amount of his payments." Accord, where infant plaintiff disaffirmed his life insurance contract and sought return of premiums he had paid. Johnson v. Ins. Co., 56 Minn. 365 (1894); and see also State ex rel. Schaefer v. Ins. Co., 104 Minn. 447 (1908). For an extended discussion as to restitution by plaintiff, seeking through recission to recover back insurance premiums, see prevailing and dissenting opinions in Moore v. Mutual Reserve Fund Assoc., 121 N. Y. App. Div. 335 (1907), a case of recission for fraud. Upon restoration of consideration in recission for fraud see also, Schank v. Schuchman, post p. 606.

BREWSTER v. WOOSTER.

131 N. Y. 473.—1892.

Per Curiam.—We deem it unnecessary to refer in detail to the complicated transactions disclosed by the evidence. The plaintiff in his complaint sought to recover of the defendant the value of certain real estate and chattels transferred by him to the defendant in part performance of a contract for the purchase by the plaintiff and two other persons, from the defendant, of a certain stock of goods and certain machinery owned by the latter, valued in the contract at $44,000. The judge on the trial dismissed the complaint on the ground that the action was based on a rescission of the contract by the plaintiff and that it could not be maintained for the reason that the plaintiff had not restored to the defendant what he had received under the contract, and also that there was no allegation or proof of demand before bringing the action. * * * *

The possession of the stock and machinery embraced in the contract of sale was transferred by the defendant to the purchasers, who sold a portion of the goods, receiving therefor about $900. The defendant, however, retained the title to the machinery as security for the full performance of the contract by the purchasers. The defendant, after the payments above mentioned had been made, claiming that the purchasers had not performed their contract, took possession of and sold to third persons all the stock and machinery embraced in the original contract, except the portion of the stock sold by the purchasers as above stated. The seizure and sale was made without the consent of the purchasers and while the contract was in force, since, although it was after the time originally fixed in the contract for performance by the purchasers, it was during a period over which the time had been extended by the agreement of the defendants. * * * *

What the plaintiff has done is to bring his action for the consideration paid by him, based upon a rescission of the contract by the defendant. He elects to accept the situation in which the defendant has placed himself and treats the contract as if the abandonment and rescission by the latter was binding upon all parties. To such a situation the rule that a party seeking rescission must return what he has received under it, is inapplicable. The defendant has retaken and sold to other parties the whole subject of the contract of sale, except the small part of the goods disposed of by the purchasers, and these were sold with the authority and consent of the defendant. The purchasers cannot return this part in specie and cannot restore the defendant to the precise situation in which he was when the contract was made. They committed no fault in selling the part of the goods sold by them, as this was in accordance with the understanding and the contract between the parties. The money received can be applied as so much of the consideration returned to the purchasers, and the recovery limited to the excess.

It would be a useless form to require the plaintiff before bringing the action, to pay or offer to pay the defendant the sum received for the goods sold by the purchasers. Whether the attempted rescission of the contract by the defendant was justified or not, or whether complete or not, the purchasers had a right to accept and act upon his theory of the situation. See Graves v. White, 87 N. Y. 463.

The case is novel, and the facts are not easily ascertainable from the evidence. We confine our decision to two points: first, that under the circumstances disclosed it was not a defense that the plaintiff had not, before bringing the action, restored or offered to restore to the defendant the goods sold or their proceeds, and second, that no demand of the defendant was necessary to give a right of action, for the reason that the duty of the defendant to return the consideration received from the plaintiff arose when he retook the property for which the consideration was given and transferred it to third persons.

The judgment should be reversed and a new trial ordered.[1]

---

d. Impossibility of Performance.

i. *Plaintiff in Default.*

SIEGEL, COOPER & CO. v. EATON & PRINCE CO.

165 Ill. 550.—1897.

This is an action by appellee, against appellant, begun in the circuit court of Cook county, to recover money due appellee under a contract to construct an elevator in a building belonging to appellant, which was destroyed during the progress of the work. The whole contract price was $2,500, payable as the work progressed, as follows: One-half when engine is on foundation, and final payment to be due and payable when the elevator is put up in good running order. The first count of the declaration, which is in assumpsit, sets up the contract, and alleges that the engine mentioned therein was on the foundation prior to the fire, and claims a right to recover $1,250 by the terms of the contract; the second count also sets up the contract, and alleges the performance of work and furnishing of materials by plaintiff of the value of $2,000, when, without his fault, the building was destroyed. The plea is the general issue.

[1]Accord, Todd v. Leach, 100 Ga. 227, digested ante p. 183, note.

The cause was tried on the following stipulation: "It is hereby stipulated and agreed that the plaintiff and defendant entered into the contract hereto annexed on the first day of June, 1891; that under the said contract the plaintiff, on the first day of August, 1891, had the engine mentioned therein on its foundation, but not leveled nor fastened to said foundation, and had prepared material and done labor under said contract to the total value of $1,390; that neither the cabs, the cage, nor the cable for the same was on said premises at the time the premises of Siegel, Cooper & Co. were destroyed by fire; that the engine had been placed on the foundation about 6 o'clock on Saturday afternoon, August 1, 1891; that fire destroyed the premises of Siegel, Cooper & Co., in which said elevator and machinery therefor, under said contract, were to be placed, and broke out about 7:30 o'clock on Monday morning, August 3, 1891; that all work to be done under the contract had not been performed when the premises were destroyed by fire; that the premises were destroyed by fire without the fault of either party to the contract, and nothing had been paid to the Eaton & Prince Company by Siegel, Cooper & Co. under or upon the said contract; that defendant had the hatchways ready for the elevator work on July 10, 1891, and plaintiff had the uninterrupted use of the hatchways on and after that date. It is further stipulated that the jury in this case shall be waived, and the same submitted to the court for trial without a jury."

The plaintiff recovered judgment for $1,390—the full value of material furnished and labor done. That judgment has been affirmed by the Appellate Court.

The trial court held the following propositions in the decision of the case:

"The court holds, as a matter of law, that if the plaintiff made and entered into the contract in evidence with the defendant for the construction of an elevator and appurtenances, as set forth in said contract; that work under said contract had so far progressed that the engine thereof had been placed upon its foundation, and that afterwards, and without fault on the part of the plaintiff, the building in which the said elevator, with its appurtenances, etc., was to be placed or constructed, was, on or about August 1, 1891, destroyed by fire, then the plaintiff was excused from further compliance with said contract, and is entitled to recover of and from the defendant the sum of $1,250, with interest thereon at the rate of 5 per cent. per annum from said August 1, 1891."

"And the court further holds, that if the plaintiff set about the performance of said contract and prepared material and machinery in accordance with the terms of said contract, and delivered a part thereof to the building in which said elevator and its appurtenances was to be constructed or built, and that afterwards, and on or about the first day of August, 1891, the said building in which said elevator was being constructed was destroyed by fire without the fault of the plaintiff, then, as a matter of law, the plaintiff is entitled to

recover of and from the defendant the full value, to be determined by the evidence or stipulation of the parties, of all work done and material prepared and delivered to said building, pursuant to said contract, prior to the happening of the fire."

MR. JUSTICE WILKIN.—It is insisted that the court erred in holding the propositions set forth in the statement and in refusing counter propositions asked by appellant, its contention being that the contract is an entire one, and, the building in which the elevator was to be placed having been destroyed by fire before the time for final payment, without any fault of either party, no recovery for the work done or materials furnished could be had.

As will be seen from the plaintiff's declaration, it proceeded on two theories: First, that the contract was not an entire one, so far as the payments were concerned; and second, even if it was, under the law plaintiff was entitled to recover the value of the work done and materials furnished prior to the destruction of the building. The judgment is upon this last theory, and is based upon the law as stated in the second of the above propositions.

The theory upon which the second proposition is based is, that under the contract requiring the elevator to be placed in a particular building it was the duty of defendant to furnish and provide that building, and therefore it is liable, even though the destruction was without its fault. The rule of law, as we understand it, is otherwise. Thus, in Addison on Contracts, sec. 554, it is said: "Where a man contracts to expend material and labor on a building belonging to and in the occupation of the employer, to be paid for on completion of the whole, and before the completion the buildings are destroyed by accidental fire, the contractor is excused from the completion of the work, but is not entitled to any compensation for the work already done, which perished without any fault of the employer." This doctrine is sustained by Brumby v. Smith, 3 Ala. 123; Lord v. Wheeler, 1 Gray 282, and Gillon v. Toudy, 5 W. N. C. (Pa.) 528. The rule seems to be adduced from the case of Appleby v. Meyers, L. R. 2 C. P. 651. In that case the action was to recover for a part performance on a contract to furnish and attach to a building of the defendant certain machinery, to be paid for upon the completion of the work. The premises, together with part of plaintiff's materials, were destroyed by fire before the contract was completed. It was held that there was no right of action, the court saying: "We think when, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." See Bishop on Contracts, sec. 588.

It is insisted by counsel for appellee, and the decision of the Appellate Court is in conformity with that contention, that a different rule is announced in Cleary v. Sohier, 120 Mass. 210, and Rawson v. Clark, 70 Ill. 656. We do not so understand either of these cases. The Massachusetts case was upon an oral contract

to lath and plaster a certain building at a certain price per square yard. *"No agreement was made and nothing was said as to terms or times of payment,* but only that the work was to be done for 40 cents per yard." A certain part of the work being done, the building was destroyed without the fault of either party. The amount claimed by plaintiff was $474, the reasonable value of the work done. All that is said by the court in the decision of the case is: "The building having been destroyed by fire without the fault of the plaintiff, so that he could not complete his contract, he may recover under a count for work done and materials furnished," citing Lord v. Wheeler, *supra,* and Wells v. Colman, 107 Mass. 514. This in no way conflicts with Appleby v. Meyers, *supra,* for it was said in that case: "It is quite true that materials worked by one party into the property of another become part of that property. This is equally true whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer or tailor or shipwright is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such case the non-completion is because the shipwright did not choose to go on with the work, as was the case in Roberts v. Havelock,[1] or because in consequence of a fire he could not go on with it, as in Menetone v. Athawes.[2] But, though this is the *prima facie* contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it illegal or absurd in the workman to agree to complete the whole and to be paid when the whole is complete, and not till then, and we think the plaintiffs in the present case had entered into such a contract."

The case of Rawson v. Clark has no bearing whatever upon this case. There the plaintiff agreed to "manufacture and place in the building" certain iron work for a certain price, 85 per cent. of which was to be paid on the certificate of the architect as the work progressed, and the balance, 15 per cent., when the work was completed. The suit was for the iron work which had been manufactured. The evidence showed that the price agreed upon for manufacturing the iron was $206, and for putting it up about $75. Upon the completion of the manufacturing of the iron and the delivery of a small portion of it the defendant notified the plaintiff that the building was not ready for the work, and directed him to send no more until it should be ready, promising to notify him when that time arrived. A week later the building was destroyed by fire. The time required to put up the work would have been about two days, so that it clearly appeared in that case that the

[1] 3 B. & Ad. 404.
[2] 3 Burr. 1592.

plaintiff was prevented from completing the work, not by the destruction of the building by fire, but because the defendant did not have it ready for the work when the plaintiff offered to complete it, and hence we said: "Appellees were no way in default. They were ready and offered to fully perform within the time limited, but were prevented by appellant. The reason of their not entirely completing their contract by placing the iron work in the building was the default of the defendant in not having a building provided for the purpose." This certainly does not mean that they were in default in not having a building because it was finally destroyed by fire, but because the building "was not then ready for the work," etc.

We think the law is, that where a contract is entered into with reference to the existence of a particular thing, and that thing is destroyed before the time for the performance of the contract, without the fault of either party, both parties are excused from performing the contract, but neither is entitled to recover anything for a part performance thereof. It remains, however, to be determined whether this contract is an entire contract within that rule. It will be seen that by its terms payment was to be made, not upon the completion of the work, but "as the work made progress, as follows: One-half when the engine is on foundation, and final payment to be due and payable when the elevator is put up in good running order," thus clearly providing for payment by instalments. Counsel insist, however, that this does not destroy the entirety of the contract, because, they say, the $1,250 was a mere arbitrary sum, fixed without reference to the value of the work done at the time designated for its payment, and that the phrase "when the engine is on foundation," merely named an arbitrary time at which a partial payment should be made, without reference to the value of the work and material furnished at that time, and that the payment of the instalment in that manner was merely for the convenience of the contractor and as an evidence of good faith of Siegel, Cooper & Co. in completing its part of the contract. If all this were true we are unable to see why the contract is not severable, so far as the payments are concerned. But we do not think the contract is fairly susceptible of that construction. The $1,250 is not a mere arbitrary sum fixed without reference to the value of the work done at the time of paying the instalment. Payment was to be made as the work progressed—one-half when the engine was on the foundation. The parties here fixed the sum, by agreement, which should be paid when the work had progressed thus far, and presumably with reference to the value of the material and labor then placed in the defendant's building. That it served the convenience of the contractor and evidenced the good faith of the employer in no way affects the case.

Parsons, in his work on Contracts (vol. 2, 6th ed., sec. 517), speaking of the entirety of contracts, says: "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item

to be performed, or is left to be implied by the law, such a contract will generally be held to be severable; and the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire." See note c. to the same section.

In Schwartz v. Saunders, 46 Ill. 17, Saunders made a contract with Schwartz to do carpenter work and furnish the material therefor on a brick building being erected, to be paid for as the work progressed, upon estimates to be furnished by the architect. The building was blown down after an estimate of certain carpenter work and before the contract was completed, and it was held that the contractor, under such circumstances, was justified in abandoning the contract, and entitled to a mechnic's lien for the work done. It was contended there, as here, that the destruction of the building absolved both parties and protected the defendant from any action for the work done, the case of Appleby v. Meyers, *supra*, being relied upon to support the contention; but it was said of the Appleby case (p. 23): "This case we have examined, and from the statement of it, it would appear that the contract was unlike the one between these parties, which provides, in terms, that 85 per cent. of the work estimated by the architect should be paid as the work progressed, whilst in the case cited no payment was to be made until the work was completed, and as it was not completed the mechanic could not recover for the work he had done." It is true that there are distinguishing features between that case and this, prominent among which is the fact that there the defendant had positively refused to pay the architect's estimate of the work done before the destruction of the building, and afterwards refused to pay the same, insisting that to entitle him to pay therefor he was bound to replace the wórk destroyed without any compensation, and the plaintiff's right to abandon the work was placed partly upon the refusal to pay and the unjust demand, as well as the destruction of the building. But the case does not hold that where, by the terms of a contract of this character, payment is to be made as the work progresses, the doctrine announced in Appleby v. Meyers has no application.

We think that the Appellate Court properly ruled that plaintiff was entitled to recover under the first count of the declaration, but we are unable to find authority or satisfactory reason upon which to sustain the second. The language "payment to be made as the work progresses," cannot, we think, be considered to mean more than that the $1,250 should be paid as stated—that is, it cannot be construed to mean that payments after the engine was on the foundation should be made as the work progressed, it being expressly stated, "final payment to be due and payable when the elevator is put up in good running order"—that is, when the work was complete. Therefore, on a proper construction of the contract the second proposition should have been refused. There was, however, no error in the judgment of the trial court, because, under the first proposition, which, as we have seen, was properly held, the

plaintiff was entitled to recover the $1,250, with 5 per cent. interest thereon from August 1, 1891, to the date of judgment, July 5, 1895, which amounted to considerably more than $1,390 recovered.

The judgment below will be affirmed.

Judgment affirmed.[1]

PHILLIPS and CARTWRIGHT, JJ., dissenting.

[1] In accord with the doctrine of this case, the court held in Huyett & Smith Co. v. Chicago Edison Co., 167 Ill. 233 (1897), that where plaintiff contracted to construct a ventilating system in a building for $1,350, "payable thirty days after completion and acceptance," plaintiff could not recover for any work done, the building having been destroyed by fire before completion of the work, without fault of either party. Accord, Krause v. Board of Trustees, 70 N. E. 264 (Ind. Sup. Ct., 1904), containing an extended discussion.

In Appleby v. Dods, 8 East (K. B.) 300 (1807), a seaman sued to recover *pro rata* wages the voyage not having been completed because the vessel was lost at sea. The court said: "The terms of the contract in question are quite clear and reasonable: they relate to a voyage out to Madeira and any of the West India Islands, and to return to London; and there is an express stipulation 'that no seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the above-mentioned port of discharge,' etc.; which must refer to London. And though the reason of this stipulation was, no doubt, to oblige the mariners to return home with the ship, and not to desert her in the West Indies, yet the terms of it are general, and include the present case: and we cannot say, against the express contract of the parties, that the seamen shall recover *pro rata,* although the ship never did reach her port of discharge named."

HAYES v. GROSS.

9 App. Div. (N. Y.) 12.—1896.[1]

Landon, J.—When a builder agrees to erect and complete an entire house, if the house is destroyed by fire before completion, the builder can erect another; and, if he does not do so, he is guilty of a breach of his contract. Tompkins v. Dudley, 25 N. Y. 272. But if a painter agrees to paint a certain house, and the house is destroyed before the painting is finished, it is impossible for him to complete his contract. If a new house should be erected, it would not be the house he had agreed to paint. Why should not the painter be paid for his part performance? It was no fault of his that full performance was impossible. Whelan v. Clock Co., 97 N. Y. 293. But why should the owner pay? Because every stroke of the painter's brush converted something of the painter's labor and material into the property of the owner, and thus the fire destroyed the owner's property, and not the painter's. If the painter had been painting a boat which he had agreed to make and deliver to the vendee, and fire had destroyed it before delivery, the whole loss would have been his, and not the vendee's, since title would not pass until delivery. Andrews v. Durant, 11 N. Y. 35. In Wolfe v. Howes, 20 N. Y. 197, a mechanic agreed to do for an entire year all the pot room work necessary to be done in defendant's glass works for $40 per month, $10 to be paid monthly, the balance at the end of the year. He performed as he agreed from May until December, when he was disabled by sickness of which he subsequently died. His representative was held entitled to recover the sum unpaid for the time he actually served. Why not? It was impossible for him to complete his contract, and the defendant had the benefit of what he did do. If a trader agrees to sell and deliver to B. 607 bales of cotton, marked "X," stored in his warehouse, and does deliver 460 of them, and the remaining 147 bales are destroyed by fire before delivery, of course he cannot deliver them, and the law excuses him. Dexter v. Norton, 47 N. Y. 62. But the vendor being without fault, if the vendee refuses to return the 460 bales which he has received, and to which he has no title, he ought to pay for them, unless the same fire also destroyed them. Kein v. Tupper, 52 N. Y. 550. Of course, the loss of the undelivered bales falls upon the vendor.

In the case before us, the defendant owned the building, and the plaintiff was under a contract with him to do certain specified carpenter and joiner work therein, and to furnish the materials therefor, for a price fixed for the whole, to be paid, however, in installments as the work advanced. The plaintiff had performed a large part of the work as agreed, and had been paid several installments when the building was destroyed by fire without fault by either party.

[1] Judgment affirmed in 162 N. Y. 610 (1900), on the opinion of Landon, J., below.

If the views above expressed are correct, then the plaintiff is excused from further performance, because it became impossible without fault of his own, and he is entitled to recover for all the labor and material which he added to the house, because his further performance is impossible, and therefore cannot be interposed as an obstacle to his recovery, and also because what he thus added became the defendant's property, and thus the fire destroyed the defendant's, and not the plaintiff's, property.

The learned referee placed his decision in favor of the plaintiff upon Niblo v. Binsse, 1 Keyes 476, a case in its particulars almost identical with the one before us. The learned referee reluctantly yielded to the authority of that case, because of the similarity of its facts to this case, at the same time confessing that he could not harmonize it with the numerous cases which hold that, when performance of a contract depends upon the continued existence of its subject-matter or of some other essential, the law implies that the contract is based upon such continued existence; and, such existence ceasing, the obligation of the contract ceases, leaving each party without recourse to the other, on account of any breach of the contract. Dexter v. Norton, supra; Goldman v. Rosenberg, 116 N. Y. 78, 22 N. E. 259; Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595; Taylor v. Caldwell, 3 Best. & S. 826, 113 E. C. L. 824. These cases simply denied the right of recovery of damages for breach of the contract. In Dexter v. Norton the plaintiff sought to recover the damages he sustained because the defendant did not deliver him the 147 bales of cotton which the fire destroyed. In Goldman v. Rosenberg the plaintiff sought to compel the defendant to complete his purchase of a lot which had a valuable building upon it, that was destroyed by fire before the day fixed for the performance of the contract, or to charge the defendant with damage for his nonperformance, the action being for an accounting between partners. In Stewart v. Stone the patron of defendant's cheese factory, at which the patron had delivered milk to be made into cheese at a stipulated price, sued to recover for the cheese which was destroyed by the burning of the factory, without fault of the defendant. In Lorillard v. Clyde both parties were interested in a corporation which the plaintiff was induced to enter, upon the defendant's guaranteeing that it would pay a certain annual dividend for seven years. The corporation was dissovled at the suit of the attorney general at the end of five years. The plaintiff sought, nevertheless, to recover the dividend upon his shares of stock for the two years following its dissolution. In Taylor v. Caldwell the defendant agreed to let the plaintiff his music hall for four nights. Before the first night arrived, the hall was destroyed by fire, without fault of defendant. The plaintiff sought to recover damages for nonperformance. In all these cases the plaintiff failed to recover, because in each case the law implied the condition of the continued existence of the subject-matter of the

contract or of an essential respecting it; that is to say, the defendant was not at fault for its breach. In none of them was it decided that an innocent contractor, who has added his labor and materials to the owner's property, cannot recover for them when the owner has lost his property by fire, and the contractor is by the fire, without fault on his part, both prevented and excused from adding the balance of labor and material which his contract called for. The noncontinuance of the subject-matter excuses him from further performance; but we see no reason why his employer should not bear his own loss, and pay for the property which he acquired. When part performance has been made, and there is a legal excuse for further performance, then there is no legal defense to the demand for payment for part performance, unless it is in such a case as is suggested by Johnson, C. J., in Wolfe v. Howes, 20 N. Y. 197, namely "that it was material that the defendant had received actual benefit from the services of the plaintiff's testator, and that quite a different question would be presented where the services actually rendered should prove valueless; as, e. g., if one should be retained to compose an original literary work, and, having faithfully employed himself in preparation, should die without having completed any work of value to the employer." The report adds that "Comstock, J., and other judges concurred in this qualification." In the case before us the defendant received actual benefit from plaintiff's services, but, because of the fire, lost it.

We think Niblo v. Binsse, upon which the learned referee relied, was correctly decided, but, with due respect, we submit that the decision was placed upon untenable ground. The court said that it placed his decision upon the ground that the contractor was prevented from performing his contract by the default of the owner in failing to keep on hand and in readiness the building in which the work was to be done; and that the owner was in default whether the building was destroyed with or without fault on his part.[1] The case shows that the building was destroyed without fault of either owner or contractor. If the defendant was without fault in the destruction of his building, it is difficult to see how he was in default for not keeping it on hand. In the Niblo case, as in the one under review, we think the destruction of the building prevented and excused the defendant from keeping it on hand, and that neither party could recover damages of the other upon account of the breach of the contract thereby caused. Authorities in other states, while denying the right of either party to the contract to recover of the other damages for a breach of the contract when performance is defeated by the destruction of the building (except in cases like Tompkins v. Dudley, first above cited, where the terms of the contract preclude implying the condition of its continued existence), affirm the right of the contractor to recover for what he has done and furnished up to the time of its destruction. Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667;

[1] This argument was adopted also in Haynes v. Second Baptist Church, 12 Mo. App. 536, 545 (1882), aff'd 88 Mo. 285 (1885).

Cook v. McCabe, 53 Wis. 250, 10 N. W. 507; Haynes v. Second Baptist Church (Mo.), 57 Am. Rep. 413.

It follows that the judgment should be affirmed, unless the record shows some error to the prejudice of the defendant. The measure of damages stated by the learned referee in his opinion is the value of the labor and materials furnished and his proportionate profits to the time of the fire. He applied this rule by allowing the contractor the contract rates for his labor and material. This, we think, was right. He, however, allowed the plaintiff $309.10 for materials which he had procured in order to place them in or upon the building, but which he had not actually placed at the time of the fire. These items we cannot allow, since they had not been added to the building, and therefore were not defendant's property. Although the action is not upon the contract, the contract affords the best evidence between the parties as to the value of the labor and materials furnished. There are authorities to the effect that where the contractor is to be paid in installments, upon the completion of certain parts of the work, each installment becomes a debt as the particular portion specified is completed; and, as to the incompleted portion at the time of the fire, no recovery can be had, because the installment is not due. Richardson v. Shaw, 1 Mo. App. 234; Clark v. Collier, 100 Cal. 256, 34 Pac. 677; Add. Cont. (9th ed.) 809. If the action were upon the contract, this would be so; but, as it is not, the rule should not apply. The contract no longer binds the parties, or, if it does, its breach is excused, and therefore the breach is not available to defeat recovery for what has been done under it. Such, we think, is the sensible rule, and the one supported by the authorities in this state (Wolfe v. Howes, Whelan v. Ansonia Clock Co., and Niblo v. Binsse, supra); also, by the cases above cited from Massachusetts, Maryland, and Wisconsin.

The defendant's exceptions to the admission of the plaintiff's books containing accounts kept by him with the "Gross Hotel," the building in question, and with the defendant, are not well taken. These accounts contained in detail the items of materials and labor which the plaintiff furnished upon his contract, and also various cash items connected with the performance of the contract. These items were verified by the testimony of the plaintiff and his assistant. They were not admitted because the book contained them, but because shown by competent testimony to be true. The record shows that the referee carefully and properly examined them, and rejected such items as were not properly chargeable to the defendant, except the items amounting to $309.10, which we conclude to reject.

We think the judgment should be modified by deducting $309.10 and the interest thereon, and, as so modified, be affirmed, with costs. All concur.[1]

[1] The same result is reached where the labor and material are expended upon a chattel, whether the chattel when destroyed is in the possession of the defendant, Whelan v. Clock Co., 97 N. Y. 293 (1884), or of the plaintiff, Labowitz v. Frankfort, 4 N. Y. Misc. 275 (1893).

BUTTERFIELD v. BYRON.

153 Mass. 517.—1891.

Action by Alonzo M. Butterfield, for the benefit of the London & Lancashire Insurance Company and the Commercial Union Assurance Company, against Napoleon L. Byron, for damages for the breach of a contract for the erection of a building by defendant for plaintiff on the lands of the latter. The contract provided that the building should be completed on a certain day; that plaintiff should pay defendant a certain amount therefor; 75 per cent. of the amount of work done and materials furnished during the preceding month to be paid for on the first of each following month, and the remaining 25 per cent. to be paid after the entire completion of the building. Certain amounts were paid defendant, and when the building was nearly completed it was destroyed by fire. The insurance companies paid plaintiff the amount of his loss, and took an assignment of all sums then due and becoming due to him from defendant by reason of his breach of the contract. After the fire, defendant took away from the premises certain building material of the value of $38, belonging to plaintiff.

Knowlton, J.—It is well established law that where one contracts to furnish labor and materials, and construct a chattel, or build a house, on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building without his fault before the time fixed for the delivery of it. Adams v. Nichols, 19 Pick. 275; Wells v. Calnan, 107 Mass. 514; Dermott v. Jones, 2 Wall. 1; School-Dist. v. Bennett, 27 N. J. Law 513; Tompkins v. Dudley, 25 N. Y. 272. It is equally well settled that when work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. Taylor v. Caldwell, 3 Best & S. 826; Lord v. Wheeler, 1 Gray, 282; Manufacturing Co. v. Butler, 146 Mass. 82, 15 N. E. Rep. 76; Bank v. Beal, 141 Mass. 566, 6 N. E. Rep. 742, and cases there cited; Dexter v. Norton, 47 N. Y. 62; Walker v. Tucker, 70 Ill. 527. In such cases, from the very nature of the agreements as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it

is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, what is the true interpretation of the contract? Was the house, while in the process of erection, to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged again and again to begin anew on account of the repeated destruction of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff towards the erection of which the plaintiff himself was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting and plumbing were to be done by the plaintiff. Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial. Howell v. Coupland, 1 Q. B. Div. 258. It seems very clear that after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone-work, brick-work, painting and plumbing for another house of the same kind. The plaintiff might have answered: "I do not desire to build another house, which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault, I am under no further obligation." If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part toward the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him

by the specifications for more than one house, and, if that was destroyed by inevitable accident just before its completion, he was not bound to build another, or to do anything further under his contract. If the plaintiff was not obliged to make his contribution of work and materials toward the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract, after a building, the product of their joint contributions, had been partly erected, was on an implied condition that the building should continue in existence. Neither can recover anything of the other under the contract; for neither has performed the contract so that its stipulations can be availed of. The case of Cook v. McCabe, 53 Wis. 250, 10 N. W. Rep. 507, was very similar in its facts to the one at bar, and identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a *pro rata* share of the contract price for the work performed and the materials furnished before the fire. Clark v. Franklin, 7 Leigh 1, is of similar purport.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without fault of either of the parties, is in dispute, upon the authorities. The decisions in England differ from those of Massachusetts and of most of the other states of this country. There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. Allison v. Insurance Co., L. R. 1 App. 209, 226; Byrne v. Schiller, L. R. 6 Exch. 319. In the United States and in continental Europe the rule is different. Griggs v. Austin, 3 Pick. 20, 22; Brown v. Harris, 2 Gray 359. In England it is held that one who has partly performed a contract on property of another, which is destroyed without the fault of either party, can recover nothing; and, on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money. Appleby v. Meyers, L. R. 2 C. P. 651; Navigation Co. v. Rennie, L. R. 10 C. P. 271. One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction. Whincup v. Hughes, L. R. 6 C. P. 78. But where one dies, and leaves unperformed a contract which is entire, his administrator may recover any instalments which were due on it before his death. Stubbs v. Railway Co., L. R. 2 Exch. 311. In this country, where one is to make repairs on the house of another under a special contract, or is

to furnish a part of the work and materials used in the erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished. In Cleary v. Sohier, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for forty cents per square yard. The building was destroyed by a fire which was an unavoidable casualty. The plaintiff had lathed the building, and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sued on an implied assumpsit for work done and materials found. It was agreed that, if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover. See, also, Lord v. Wheeler, 1 Gray 282; Wells v. Calnan, 107 Mass. 514, 517. In Cook v. McCabe, *ubi supra,* the plaintiff recovered *pro rata* under his contract; that is, as we understand, he recovered on an implied assumpsit at the contract rate. In Hollis v. Chapman, 36 Tex. 1, and in Clark v. Franklin, 7 Leigh 1, the recovery was a proportional part of the contract price. To the same effect are Schwartz v. Saunders, 46 Ill. 18; Rawson v. Clark, 70 Ill. 656; and Clark v. Busse, 82 Ill. 515. The same principle is applied to different facts in Jones v. Judd, 4 N. Y. 411, and in Hargrave v. Conroy, 19 N. J. Eq. 281. If the owner, in such a case, has paid in advance, he may recover back his money, or so much of it as was an overpayment. The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them; the law dealing with it as done at the request of the other, and creating a liability to pay for it, its value to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable. Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done.

The only question that remains in the present case is one of pleading. The defendant is entitled to be compensated at the contract price for all he did before the fire. The plaintiff is to be allowed for all his payments. If the payments are to be treated merely as advancements on account of a single entire consideration, namely, the completion of the whole work, the work not having been completed, they may be sued for in this action, and the defendant's only remedy available in this suit is by a declaration in set-off. If, on the other hand, each instalment due was a separate consideration for the

payment made at the time, then, as to those instalments and the payments of them, the contract is completely executed, and the plaintiff can recover nothing, and the implied assumpsit in favor of the defendant can be only for the part which remains unpaid. We are of opinion that the consideration which the defendant was to receive was an entire sum for the performance of the contract, and that the payments made were merely advances on account of it, and that, on his failure to perform the contract, there was a failure of consideration which gave the plaintiff a right to sue for money had and received; and that the like failure of consideration on the other side gave the defendant a right to sue on an implied assumpsit for work done and materials found.

The $38 due from the defendant to the plaintiff cannot be recovered in this action. The report and the pleadings show that the suit was brought, under an assignment for the benefit of the insurers, to recover damages for a breach of the contract for the erection of the building, and not to recover the value of the shingles or weights carried away from the ruins. According to the terms of the report, the ruling being wrong, such order may be made as this court shall direct. A majority of the court are of opinion that the verdict should be set aside, and the defendant be given leave to file a declaration in set-off, if he is so advised, on such terms as the superior court deems reasonable.

Verdict set aside.[1]

[1]In Angus v. Scully, 176 Mass. 357, 57 N. E. 674 (1900), plaintiffs contracted to move three buildings for the sum of $840. They moved one building, and had moved the second one about half the distance when the latter was destroyed by fire. Thereupon, with consent of defendant, no further moving was done under the contract. The court said: "With particular reference to the circumstances of this case, the rule may be said to be that where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, then he may recover for what he has done. This case comes clearly within this rule. Lord v. Wheeler, 1 Gray 282. Butterfield v. Byron, *ubi supra,* and cases therein cited." Accord, Young v. City of Chicopee, 186 Mass. 518 (1904).

IMPOSSIBILITY DUE TO DEFECTIVE PLANS. In Huetter v. Warehouse Co., 81 Wash. 331 (1914), plaintiff, a subcontractor, agreed to construct a fill and viaduct for defendant according to specifications furnished by the city engineer, the work to be paid for from time to time. After partial completion the structure collapsed because the specifications were defective. It was held that plaintiff could recover for work and materials put into the structure before the collapse, though the specifications were furnished by the city and not by defendant, in the absence of any guaranty by the plaintiff as to the sufficiency of the plans. Contra, that in the absence of a guaranty of the plans by the owner, the making of the contract implies that the contractor understood plans that are made a part of the contract. Lonergan v. Trust Co., 101 Tex. 63 (1907).

WOLFE, Executor, v. HOWES.

20 N. Y. 197.—1859.

The complaint contained the common counts only for work, labor and services done by Nicholas Vache, the testator, for the defendants. The defendants denied the facts averred in the complaint, and set up as a separate defense that the work was done under a special contract not performed by Vache in his lifetime, and claimed damages for the breach of the contract on his part. On the 1st of May, 1852, the defendants and testator entered into a contract in writing as follows:

"Memorandum of an agreement made this day. Howes, Scofield & Co. (defendants), of the first part, and Nicholas Vache of the second part, Witnesseth, That for and in consideration of $1 to me in hand paid, and receipt whereof I do acknowledge, do agree on my part to do all the pot-room work for said parties of the first part, in a good and workmanlike manner, for one year from the date of this contract, at the price of $40 per month, $10 of which is to be paid me monthly. Dunbarton, May 1, 1852. If extra help is needed, we agree to furnish it.

(Signed) Nicholas Vache."

The trial was before a referee, who found the following facts: The plaintiff's testator entered upon the performance of the contract, and continued to fulfill it in all respects according to the terms thereof, in a good and workmanlike manner from the 1st day of May, 1852, to the 7th day of December, following, when Vache became sick and unwell, and so continued for a long time, and at length died. By reason of his said sickness, and without fault on his part, he became and was incapable of further performance of his said contract.

He held as a matter of law, that by reason of his sickness and death, Vache was released and discharged from the further performance of his contract, and his executor was entitled to recover a reasonable compensation for the services of his testator. That such reasonable compensation was the sum of $40 per month, for the time of the testator's service; and after deducting certain payments made to him from time to time, there was a balance due of $159.28, for which he ordered judgment with costs.

Allen, J.—There can be little doubt, I think, that the contract with Vache contemplated his personal services. This is evident, both from the nature of the business and the amount of compensation agreed to be paid him. It is also manifest from the evidence on both sides. The business of pot-making required skill and experience. It was an art to be acquired after much study and labor, and which Vache seemed to have accomplished. The execution of the work required his constant and personal supervision and labor. No common laborer could have supplied his place, and hence the

amount of his wages was largely increased beyond that of such a hand. The extra help mentioned in the contract had reference to the breaking away of the flattening, so called, and to its repair, and nothing else. The whole testimony shows this, as well as that the personal services of Vache were contracted for. The referee therefore well found and the court below well decided that such were the terms of the contract.

2. The question is then presented whether the executor of a mechanic, who has contracted to work for a definite period, and who enters upon his labor under the contract, and continued in its faithful performance for a portion of the time, until prevented by sickness and death, and without any fault on his part, from its final completion, can recover for the work and services thus performed by his testator. The broad ground is taken on the part of the defendants' counsel, that no recovery can be had under such circumstances; that full performance was a condition precedent to the right of recovery, the agreement being general and absolute in its terms, and not providing for the contingency of sickness or death.

It has undoubtedly been long settled as a general principle, both in England and in this as well as in most the other states, that where the contract is entire, nothing but the default of the defendants will excuse performance. It will be found, however, on an examination of the leading cases in our own courts, that the failure to perform was owing to the fault or negligence of the party seeking to recover. McMillan v. Vanderlip, 12 John. 165; Reab v. Moor, 19 John. 337; Jennings v. Camp, 13 John. 94; id. 390; Sickles v. Pattison, 14 Wend. 257, 8 Cow. 63, and various other cases. It is believed that not a single case can be found where the rule is laid down with such strictness and severity as the defendants' counsel asks for in the present case.

Some of the English cases do indeed rather intimate such a doctrine (Cutler v. Powell, 6 Term. R. 320; 8 id. 267; Appleby v. Dods, 8 East 300; Hulle v. Heightman, 2 id. 145, and some others). These cases are, however, capable of the same reasonable construction which the law confers upon all contracts. That of Cutler v. Powell is distinguishable in this, that by the peculiar wording of the contract it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life and to render at all hazards his personal services during the voyage, before the completion of which he died.

The great principle upon which the adjudged cases in all the courts is based, is the question, as stated in McMillan v. Vanderlip, already cited. What was the real intention of the parties? The law gives a reasonable construction to all contracts. For instance, in the present case, did the parties intend that the contract should be binding upon the plaintiff's testator in case of unavoidable sickness or death; or did they intend, and is it to be implied, that each should perform, as to the other, according to the terms of the contract,

Deo volente? It appears that a fair and legal interpretation would answer this question in the affirmative, and that such a provision must be understood and written in the contract. Nor is this principle wanting sanction either by elementary writers or adjudged cases. "Where the performance of a condition is prevented by the act of God," "it is excused." Cruise's Digest, Condition, 41, 43; 3 Kent Com. 471; 2 id. 509; 8 Bing. 231. In Mounsey v. Drake, 10 John. 27, 29, the court say, "Performance must be shown, unless prevented *by the act of God,* or of *the law.*" 1 Shep. Touchstone 180; Gilbert on Covenants 472; People v. Manning, 8 Cow. 297; People v. Bartlett, 3 Hill 570; 12 Wend. 590; Chit. on Con. 631; 1 Parsons on Con. 524, and note; 11 Verm. 562; 11 Metc. 440.

There is good reason for the distinction which seems to obtain in all the cases, between the case of a negligent or wilful violation of a contract and that where one is prevented by the act of God. In the one case, the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while in the other, its exception is calculated to protect the rights of the unfortunate and honest man who is providentially and without fault on his part prevented from a full performance.

There is another reason for relaxing the rule, which is applicable to the case we are now considering. It is well set forth in Story on Bailments (§ 36, and notes), where that learned jurist, after considering the great number of cases on this subject in the various courts of England and this country, and well observing that they are not at all times in harmony, remarks that the true rule may be considered to be, "that where the contract is for personal services which none but the promisor can perform, there inevitable accident or the act of God will excuse the non-performance, and enable the party to recover upon a *quantum meruit.* But where the thing to be done or work to be performed may be done by another person, then all accidents are at the risk of the promisor." In the present case the finding shows, and I have already remarked, justly, that the contract was personal, and that the executor could not have employed a third person to execute the contract on the part of his testator Vache.

But without pressing this point further, it is sufficient to say that it was virtually decided against the defendants by this court in the case of Jones v. Judd, 4 Comst. 411. It was there decided that when, by the terms of the contract for work and labor, the full price is not to be paid until the completion of the work, and that becomes impossible by the act of the law, the contractor is entitled to recover for the amount of his labor. In that case the work was stopped by the state officers in obedience to an act of the legislature suspending the work; and the court held that as the contractor was without fault, he was entitled to recover. The case in 10 John. 27, before cited, was referred to and approved of as authority in favor of the position; and see Beebe v. Johnson, 19 Wend. 502.

The conclusion then is, that where the performance of work and labor is a condition precedent to entitle the party to recover, a fulfilment must be shown; yet that where performance is prevented or rendered impossible by the sickness or death of the party, a recovery may be had for the labor actually done. This is not out of harmony with principle or adjudged cases, and is certainly in harmony with the rules of common honesty and strict justice. These views dispose of the main questions in the case. It is necessary to notice one or two of minor importance.

It is insisted that if sickness were an excuse for the non-performance of the contract on the part of Vache, that such excuse should have been alleged in the complaint, and this not having been done, that the plaintiff is not entitled to recover. It is true that the plaintiff might have set up the agreement and the excuse for its non-performance, and entitled himself to recover upon such a pleading. But the complaint proceeds upon a *quantum meruit;* and upon showing the work and labor of Vache the plaintiff entitled himself to recover. The defendants set up the special agreement as matter of defense, and the plaintiff's excuse was properly enough matter of reply. The contract was in fact discharged by the act of God, and its chief consequence was to measure the amount of the plaintiff's damages, or to regulate the compensation to which the plaintiff was entitled, though his remedy was upon a *quantum meruit.* So say some of the cases already cited.

Again, it is said that if the plaintiff was entitled to recover anything, it could be only $10 a month, and that the defendants' set-off having been found by the referee to amount to more than that, the defendants were entitled to judgment. This objection is not tenable. The compensation was to be at the rate of $40 per month; $10 (a part) of which was to be paid monthly. This was upon the supposition that the contract was to be performed for the whole time. This, however, having been rendered impossible, the plaintiff was entitled to recover, if anything, the full value of the services of the testator, not exceeding the rate of compensation secured by the terms of the contract.

It is further urged that the referee erred in not allowing defendants' damages accruing to them after Vache was sick and before he quit. That was a question of fact entirely for the referee. He found that the plaintiff did his work well and skillfully, down to the time of his sickness; he allowed and deducted the whole amount of set-off proved by defendants; and he does not find that the defendants sustained any damages by reason of any defect in Vache's work down to the time of his quitting, in December, 1852. With these questions of fact we cannot interfere. The court below sanctioned the finding. I think they were fully warranted in so doing. At all events, we are not at liberty to interfere.

The judgment must be affirmed.

Johnson, Ch. J., concurred, observing that it was material that the defendants had received actual benefit from the services of the

plaintiff's testator, and that quite a different question would be presented by a case where the services actually rendered should prove valueless; as e. g., if one should be retained to compose any original literary work, and having faithfully employed himself in preparation, should die without having completed any work of value to the employer. COMSTOCK, J., and other judges concurred in this qualification. Judgment affirmed.[1]

HUBBARD v. BELDEN.

27 VT. 645.—1855.

REDFIELD, CH. J.—This court having decided in Fenton v. Clark, 11 Vt. [557], that sickness will so far release a party to a contract to perform labor for an entire term from the performance of his contract, as to enable him to maintain an action to recover for part performance, it only seems to be a question of the character of the indisposition, as to severity and length of time. The sickness in the present case seems to have been sufficiently severe, as it wholly incapacitated the plaintiff from labor; and as it continued unabated for one week, and partially for two weeks, it would seem that the plaintiff was fully justified in regarding it as likely to continue as long, as it did, in fact.

We think it must be regarded as pretty clear that the defendant would be released from any obligation to wait two weeks for his hired man to recover, upon the uncertainty of his then recovering, before he employed other help. And if so, equally should the plaintiff be at liberty to leave for the time, and he would not be bound to return unless the defendant was bound to receive him, which he would not, under the circumstances of this case. He would then be entitled to recover what his part performance of his contract had benefited the defendant. This is now the settled rule in all entire contracts, where a recovery is allowed on the ground of apportionment, and a failure to perform strictly according to the terms of the contract. This was the basis of the recovery in the county court.

Judgment affirmed.

[1] Accord, Fenton v. Clark, 11 Vt. 557 (1839). In Lakeman v. Pollard, 43 Me. 463 (1857), plaintiff quit his employment "by reason of the alarm and danger" caused by the prevalence of cholera in the vicinity of the mills where he was under contract to work for the season, and he was allowed to recover upon a *quantum meruit* for the work he had done.

It is held in Patrick v. Putnam, 27 Vt. 759 (1855), that: "A person contracting to labor for a definite term and who fails to fulfill his contract by reason of sickness is liable to have the amount of his recovery reduced, by the damages sustained by the employer in consequence of his not being able to complete the full term of service;" and this rule is approved in Clark v. Gilbert, 26 N. Y. 279, 284 (1863).

WELCH v. HICKS.

6 Cow. (N. Y.) 504.—1826.

Assumpsit for freight of the ship Romeo, from Petersburg in Russia, to Princetown in Massachusetts. The declaration stated that the plaintiff, the owner of the ship, received goods on board at St. Petersburg, consigned to the defendant at New York; but the ship was forced by the violence of the winds and tempests, to put into Princetown, on her voyage to New York, where the defendant elected to receive the goods, and did receive them, and release the plaintiff from his obligation to transport them to New York. It contained counts adapted both to full and *pro rata* freight.

The judge charged, that if a vessel, laden with goods on freight, meets with a disaster in the course of her voyage, and puts into an intermediate port; and the owner of the goods receives them there, he becomes liable to pay a *pro rata* freight, and that the defendant was liable in this case to pay *pro rata* freight, unless he could show an express and positive agreement, on the part of the master, to waive and discharge all claim to freight. That the law necessarily implied an agreement to pay freight, from the act of receiving the goods; and this, notwithstanding the ability of the master to repair in a reasonable time, or send on the goods in other vessels, and his refusal, on request, to do either. That the remedy of the owner of the goods would be to abandon the goods, and bring his action for damages against the master or owner of the vessel; and in every case, under any circumstances, the owner of the goods becomes liable at all events, by the act of accepting them alone, at the port of distress, to pay a *pro rata* freight; unless he can show an express and positive agreement to the contrary. He left it to the jury to say, whether the proof established such an agreement.

Verdict for the plaintiff for $2,526.67 damages.

Curia, per Sutherland, J.—This court has repeatedly held, that freight *pro rata itineris* is due where a ship, in consequence of the perils of the sea, without any fault of the master, goes into a port short of her destination; and is unable to prosecute the voyage; *and the goods are received by the owner at such intermediate port.* 2 Caines 21; 1 John. 27; 2 John. 323, 336; 9 John. 19, 20, 186. This principle has been adopted from the decisions of the English courts, commencing with Luke v. Lyde, 2 Burr. 882, and continued, without any essential conflict or contrariety, down to the present time. 7 T. R. 381; 5 East 316; 10 East 393, 526; 2 Campb. 466; 3 Bin. 448; 5 id. 525; 7 Cranch 358; 1 Marsh. 281, note. This general principle is not disputed by the defendant's counsel. On the other hand, it is conceded, that where the master refuses to repair his ship and send on the goods, or to procure other vessels for the purpose, and the owner of the goods then receives them, that this is not such an acceptance of the goods as will entitle the ship owner

to a *pro rata* freight. It is not a voluntary acceptance. He does not elect to receive his goods at the intermediate port, and sell them there, or become his own carrier to the port of destination. He does not assent to the termination of the voyage at the intermediate port; but it having been terminated there against his will, by the refusal of the master to send on his goods to the port of destination, he does not, by receiving them under such circumstances, in judgment of law, promise to pay the freight to the intermediate port.

The judge, in his charge to the jury, entirely excluded the question, whether the acceptance of the goods was voluntary or not; and instructed them that the fact of receiving the goods under any circumstances, rendered the owner liable for a *pro rata* freight; unless he could show an express and positive agreement of the master, at the time of the delivery of the goods, to waive and discharge all claim to the freight. In this, I think, he erred. The cases already cited, particularly those in 9 John., show that, in order to raise an implied assumpsit in such cases, the acceptance must be voluntary. No other rule would be consonant with justice or equity.

But the master did finally declare his election to repair his ship, and send on the goods; and they were agreed to be received by the defendant's agent, after such declaration had been made to him. This was at first upon the express condition of his giving an order on the defendant for the freight, but finally they were delivered and received without any such condition. These circumstances are claimed to be sufficient to sustain the verdict; and it is said, admitting the judge's charge to be incorrect, as it goes beyond the facts, a new trial should not, for that reason, be granted. Under the circumstances of the case, the agent might well have supposed that there was no *bona fide* intention to repair. He swears that such was his opinion; and that the goods were finally delivered unconditionally; that is (as I understand him), without any order having been given for the freight.

I think the judge should have left it to the jury to determine whether the master did intend to repair the vessel, and complete the voyage; and whether the acceptance of the goods by the agent of the defendant was voluntary or not.

New trial granted.

---

ii. *Defendant in Default.*

SHEAR v. WRIGHT.

60 MICH. 159.—1886.

ASSUMPSIT. Plaintiff brings error.

CAMPBELL, C. J.—Plaintiff sues for a balance alleged to be due on the price of a bull-calf sold to defendant in October, 1882. The price agreed upon is alleged by plaintiff to have been fifteen dollars,

and by defendant to have been ten dollars. Six dollars is admitted to have been paid, five at first, and one dollar in subsequent dealings. Four dollars according to defendant, and nine dollars according to plaintiff, remained unpaid. This sum of four dollars, as both agree, was to be paid by services for breeding purposes of a certain bull then mentioned and owned by defendant, or, at plaintiff's election, of the calf when grown. Without any fault of defendant, this performance was made impossible by the death of the calf and an injury to the bull.

So far as the amount of the original price is concerned, the parties are in their oaths directly at variance. There was testimony tending to show that defendant knew plaintiff supposed fifteen dollars to be the price agreed on. It is also found that on a dispute arising between them, plaintiff proposed to defendant if he could go before a magistrate and make affidavit that he was to pay only five dollars in cash instead of ten, he would forgive him the other five dollars, to which defendant assented, and offered to go, but did not do so, because plaintiff did not start to go with him. The court below having found that ten and not fifteen dollars was the agreed price, we cannot review that finding of fact, and it is of no consequence what effect this testimony might have had on the mind of any one else.

The only serious question is whether the contract was released by the impossibility of performance. While a contract may be so framed as to make the contracting party absolutely bound at all events, yet such is not the universal rule. In the present case the services agreed upon could not have been rendered under the contract unless one or the other of the two animals could be had for the purpose. Their continued existence entered into the consideration of both parties as an indispensable element of performance. This being so, and there being nothing in the contract to indicate a substituted performance as within the design, the case seems to fall within the rule that under such circumstances the existence of the means of performance is a condition without which, in the absence of fault, there can be no liability. This doctrine is very clearly stated in 2 Chit. Cont. (11th Ed.) 1076, 1078, and the citations. The doctrine is reasonable, and assumes that both parties become interested in the continued existence of the subject of the condition. While the question is one of some consequence, we cannot but regret that so sharp a controversy has been continued on so small a matter.

The judgment must be affirmed.

PINKHAM v. LIBBEY, AND ANOTHER.

93 ME. 575.—1900.

WHITEHOUSE, J.—The plaintiff agreed to pay the defendants $75 for the service of their stallion to a valuable mare owned by him, "with the privilege of return for the season." At the time of the service the plaintiff gave to the defendants his negotiable promissory note for the sum of $75 in full payment of the contract price. But the service proved fruitless, and the exercise of the "privilege of return" was prevented by the sickness and death of the stallion. In the meantime the plaintiff's note had been discounted at a bank in the regular course of business, and, after it had been merged in a judgment of the court, was duly paid.

The plaintiff now brings this action to recover the amount paid by him under this contract on the ground of a want or failure of consideration.

It is the opinion of the court that upon the facts presented in the agreed statement the action is not maintainable.

It should be observed, in the first place, that this is not a contract of warranty, but for a service "with the privilege of return," for which he was to pay $75. This sum was not to be divided and made payable in two instalments, one for the service and another for the "privilege of return," or in a specified instalment for each service. The consideration was entire, and the plaintiff unhesitatingly gave his negotiable note for the full amount of the contract price at the time of the service. This note was presumptively payment. It was equivalent to cash, and the fact that the plaintiff was willing to give it has much significance upon the precise understanding of the parties in relation to this contract. By reason of his knowledge of the breeding qualities of the mare, the plaintiff apparently decided that it was not for his interest to pay the price of a contract of warranty, but preferred to pay the price of a service with the privilege of return; and from his readiness to pay the entire sum at the time the contract was made it is evident that the service actually obtained at that time was deemed by him the most important and substantial feature of the contract. In the event that this service proved fruitless, he had the "privilege of return" for further service. But it would seem that the plaintiff did not consider it probable that he would have occasion to exercise the privilege. It is obvious that that part of the contract by which one service of the stallion was actually obtained was considered positive and absolute. It depended upon no contingency. But the "privilege of return for the season" was not absolute and unconditional. It necessarily contemplated the continued existence of the stallion, and it is a settled rule of law that "in contracts from the nature of which it is apparent that the parties contracted on the basis of the continued existence of a given

person or thing, a condition is implied that, if the performance become impossible from the perishing of the person or thing, that shall excuse such performance." 2 Chit. Cont. (11th Am. Ed.), 1076; Knight v. Bean, 22 Me. 531; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, and cases cited; Spalding v. Rosa, 71 N. Y. 40; Yerrington v. Greene, 7 R. I. 589; Taylor v. Caldwell, 3 Best & S. 826. The plaintiff was absolutely assured of one service before the payment of the contract price, but the right to further service was contingent upon the life of the stallion. There was no guaranty that the horse would live through the season.

The plaintiff does not controvert this familiar principle. He does not deny "that in this case the death of the stallion excused exact or full performance" of the contract. He does not claim that the plaintiff would be entitled to recover damages for the non-fulfilment of it. But he insists that the death of the stallion did not relieve the defendants from the obligation either to return the money to the plaintiff, or give him a substantial performance of the contract by furnishing the service of some other stallion.

The agreement between these parties was analogous to a contract for personal services involving the exercise of individual skill and judgment, which can be performed only by the person named. Such contracts are not deemed to be of absolute obligation, but are subject to an implied condition that the person shall be alive and able to perform the services at the time required. Dickey v. Linscott, 20 Me. 453; Greenleaf v. Grounder, 86 Me. 298, 29 Atl. 1082; Spalding v. Rosa, *supra;* Marvel v. Phillips, *supra.* In the last-named case the court say: "A contract to render such services and perform such duties is subject to the implied condition that the party shall be alive and well enough in health to perform it. Death or a disability which renders performance impossible discharges the contract. Neither Phillips nor his estate is bound to furnish a substitute, nor is the plaintiff bound to accept one."

The plaintiff doubtless preferred the defendants' stallion because his pedigree, record, and peculiar merits seemed best calculated to accomplish the purpose in breeding contemplated by him. He contracted for the service of a particular stallion, and could not be compelled to accept the services of any other. The defendants contracted to furnish the services of their stallion, and not the services of any other. Nor does it anywhere appear in the statement of facts that there was ever any suggestion or intimation from the plaintiff that he desired or would accept the service of any other stallion in lieu of that one selected by him.

There is a class of cases represented by Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, in which it is held that, if one contracts to furnish labor and material in the construction of a building, and his contract becomes impossible of performance on account of the destruction of the building, he may recover *pro rata* for what he has done or furnished; and, on the other hand, that the owner of the building, who has made payments in advance, in such

a case may recover back so much of his money as was an overpayment. But this doctrine is clearly inapplicable to the case at bar. As before stated, the contract price was indivisible, and incapable of apportionment. The payment made by the plaintiff cannot, upon the facts of this case, be fairly deemed an overpayment. If, therefore, the plaintiff is entitled to recover anything, it must be the full amount of the contract price. But this would be unjust to the defendants. It is true the service actually had was ineffectual, and of no value to the plaintiff. But *non constat* that the privilege of return would have been of any value. The defendants made no engagement of warranty that any service would be successful.

The absolute part of the contract was executed by the voluntary act of the plaintiff in giving his negotiable note for the contract price, and the contingent part became impossible of performance. The entry must therefore be:

Judgment for defendants.

CHANDLER v. WEBSTER.

[1904] 1 K. B. 493 (COURT OF APPEAL).

THE action was brought by the plaintiff to recover a sum of £100 paid by him to the defendant as on a total failure of consideration, and the defendant counter-claimed for a sum of £41 15s.

It appeared that the defendant had agreed to let a room in Pall Mall to the plaintiff for the purpose of viewing the procession on the coronation of the King on June 26, 1902, at the price of £141 15s. A memorandum of the transaction sent by defendant to plaintiff was as follows: "To first-floor room and use of anteroom at back at 7 Pall Mall, W., to view the first coronation procession on June 26, 1902, £157 10s., less 10 per cent. £15 15s.—£141 15s." The defendant repeatedly wrote to the plaintiff asserting that by the agreement the price of the room was immediately payable, and demanding payment of it. The plaintiff, in a written letter on May 29, in answer to one of the defendant's letters, wrote, "there was really no fixed arrangement that cash was to be paid down, except that it was understood between us that the money should be obtained as quickly as possible;" but he never denied, in substance, that the price of the room was payable before the procession. The plaintiff had hired the room for the purpose of letting it to a customer, but, owing to the death of a relative, the customer did not ultimately want the room. On June 10, 1902, the plaintiff wrote a letter to the defendant in the following terms: "I beg to confirm my purchase of the first-floor room of the Electric Lighting Board at 7 Pall Mall, to view the procession on Thursday, June 26, for the sum of £141 15s., which amount is now due. I shall be obliged if you will take the room on sale, and I authorize you to sell separate seats in the

room, for which I will erect a stand. If the seats thus sold in the ordinary way of business do not realize the above amount by June 26, I agree to pay you the balance to make up such amount of £141 15s." On June 19 the plaintiff paid the defendant a sum of £100 on account of the price of the room. Subsequently it became impossible that the procession should take place on account of the illness of the King.

Wright, J., held that the plaintiff was not entitled to recover the £100 which he had paid, and that, on the construction of the letter of June 10, it appeared that the balance was not payable until after the procession, and consequently the defendant was not entitled to recover on the counter-claim.

Collins, M. R.—In this case the plaintiff agreed with the defendant for the hire of a room for the purpose of viewing the coronation procession. The price of the room was to be £141 15s. The plaintiff paid £100 before the date fixed for the procession, leaving a balance of £41 15s. unpaid. The procession did not take place. The plaintiff thereupon brought an action to recover the £100 which he had paid, and in that action the defendant counter-claimed for the unpaid balance of £41 15s. The learned judge decided that both the claim and the counter-claim failed; that the plaintiff was not entitled to recover back the £100 paid by him, and the defendant was not entitled to be paid the balance of £41 15s. Against this decision both the parties appeal, the defendant's appeal being the first in date. He contends that in the event which happened, having regard to the terms of the contract, he is entitled to the balance of £41 15s. which the plaintiff has refused to pay him. I will deal with that appeal first. The question appears really to depend upon the terms of the contract made by the parties. Contracts in these cases arising out of the postponement of the coronation have formed the subject of several decisions; and it has been held that, in cases where the doctrine of Taylor v. Caldwell, 3 B. & S. 826, applies, that is to say, where the parties have made no express stipulation that money paid for viewing the procession shall be returned in the event of no procession taking place, and where, under the circumstances of the contract, no condition to that effect can be implied, the result of the procession being prevented from taking place is, that the further performance of the contract having become impossible, the person who has paid his money in pursuance of it, on the footing of the contract being subsequently performed in full, must, nevertheless, abide the loss of what he has paid; and the person to whom a sum would have become payable on performance of the contract must also abide the loss, and cannot impose on the other party the obligation of paying that sum; in the event which has happened, the fulfilment of the contract having become impossible, both parties are relieved from further performance of it. The question is how the law so laid down is to be applied in the present case.

Dealing first with the defendant's counter-claim for the balance of £41 15s., I think that, upon the authorities, it is clear that the

defendant has a right to recover that balance, if the contract was that the price of the room should be paid before the time at which the procession became impossible. A person who has agreed to pay a sum of money cannot be in a better position by reason of his having failed to perform his obligation to pay it at the time when he ought to have done so, than that which he would have occupied if he had paid the money in accordance with the contract. If that be so, the question which we have to consider is whether the contract entered into bound the plaintiff to pay the price of the room before the date at which the procession became impossible. In my opinion it did so bind him, and it was not a condition precedent to his obligation to pay the money that the procession should take place. The terms of the contract are to be gathered from the correspondence between the parties. I need not refer to it in detail. It appears to me to be clear upon the correspondence that the understanding was that the £141 15s. for the use of the room was to be paid, either immediately or, at any rate, as soon as possible after the making of the contract, and certainly before the date when the procession became impossible. The defendant repeatedly asserts in his letters that the money has become payable; and I do not find that the plaintiff substantially disputes that assertion in his answers further than by qualifying it to the extent of saying that there was no absolute bargain that the price should be paid down in cash immediately after the making of the contract; but I think that his qualification really amounts to an admission that it was payable before the time at which the procession became impossible. Great reliance is placed by the plaintiff's counsel upon the letter of June 10, upon which WRIGHT, J., decided the case, but it appears to me that that letter is really a clear admission by the plaintiff that the obligation to pay the money had already accrued. On that letter WRIGHT, J, seems to have come to the conclusion that the happening of the procession was made a condition precedent to the liability of the plaintiff to pay, and therefore that, as to the balance of £41 15s., the plaintiff was not liable. For the reasons I have already given I do not think that was the true effect of the original contract, and the letter of June 10 appears to me to begin with a clear admission that the whole amount of £141 15s. was then due, and then to suggest, merely by way of indulgence to the plaintiff, that an opportunity should be given him of raising the money by letting seats in the room for the procession, without any waiver of the rights of the defendant under the original contract. That being so, in my opinion the application of the law, as established by the authorities which have been cited, to this case is clear. The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were, and relieves them both from further performance of the contract. Therefore, if by the contract the obligation to pay for the room did not arise until after the procession had taken place, then, the obligation being based on the happening of the procession, which has become impossible, the hirer

is relieved from that obligation; but if by the contract the obligation to pay for the room had accrued before the procession became impossible, the hirer, if he has paid, cannot get his money back, and, if he has not paid, is still liable to pay. That being so, it appears to me that the defendant is entitled to succeed on the counter-claim.

Then, with regard to the plaintiff's claim for a return of the £100, to a very considerable extent I have already dealt incidentally with the considerations which apply to that claim. The plaintiff contends that he is entitled to recover the money which he has paid on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does no doubt raise a question of some difficulty, and one which has perplexed the courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in Taylor v. Caldwell, 3 B. & S. 826,—namely, that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the courts in such cases is, I think, to some extent, an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it. In the case of Blakeley v. Muller & Co. (1903), 2 K. B. 760, WILLS, J., in giving judgment made some valuable observations on this point. He said, with regard to the decision in Appleby v. Myers, L. R. 2 C. P. 651: "That decision is, in my opinion, distinctly in point. The argument for the plaintiffs must be that the contract was rescinded *ab initio*. There is no authority to warrant that contention, and I cannot think it is well founded. The process of constructing a hypothetical contract by supposing what terms the parties would have arrived at if they had contemplated the possibility of what was going to happen is, to my mind, very unsatisfactory. It is very

difficult to construct such a contract for them. Probably, in the present case, the defendants would have stipulated for compensation for their outlay, and the plaintiffs for a return of their money; but it is impossible to say with any certainty what the result of their bargaining would have been." It seems to me that he there points out the reason why the courts have been obliged to stop short where they have, namely, at the position of the parties when the further performance of the contract was excused for both, and why they have felt themselves constrained to adopt what appears to be a more or less arbitrary rule on the subject. I think the same principle has been adopted by the decision of this court in Civil Service Co-operative Society v. General Steam Navigation Co. [1903], 2 K. B. 756, at p. 764, where the Lord Chancellor approved of a passage from the judgment of CHANNELL, J., in the case of Blakeley v. Muller & Co. [1903], 2 K. B. 760, at p. 762. In that passage the learned judge supports what I have already said, namely, that where the doctrine of Taylor v. Caldwell, 3 B. & S. 826, and Appleby v. Meyers, L. R. 2 C. P. 651, applies, the result is that the law leaves the parties where they were when the further performance of the contract became impossible. It treats the contract as a good and subsisting contract with regard to things done and rights accrued in accordance with it up to that time; but, as the basis of the contract has failed, it excuses the parties from further responsibility under it. For these reasons I think the judgment was right as to the claim, but wrong as to the counter-claim. The appeal must therefore be allowed and the cross-appeal disallowed.

[Concurring opinions by ROMER, L. J., and MATHEW, L. J.]

Editorial note from 20 Law Quarterly Review, 3: The postponement of the coronation processions and the naval review in June, 1902, gave rise to some interesting questions. In Krell v. Henry (1903), 2 K. B. 740, 72 L. J. K. B. 794, the defendant had agreed to hire rooms in Pall Mall for the days only of June 26 and 27, the plaintiff having announced that they were to let for viewing the coronation processions, but there were no words about that purpose in the letters forming the agreement. DARLING, J. and the C. A. held that the transaction was really a license to use the rooms for viewing the processions, assuming that they would take place on those days; that their taking place was the foundation of the contract; the C. A. held, correcting DARLING, J. in this point, that the failure which happened had the effect of discharging both parties. The case was both argued and decided on the authority of Taylor v. Caldwell, 3 B. & S. 826, 32 L. J. Q. B. 164; the decision extends that authority somewhat, for here (1) nothing was destroyed, (2) there was nothing to prevent the performance of any of the express terms of the contract. Whatever may be the best technical way of classifying such cases, the real question must be whether the

contract was unconditional or not. Suppose that here the parties' desires had been the other way, that the defendant had said: 'I have come from Australia' (as in fact some people did) 'on purpose, and if I cannot see the procession I will see London, and the use of the rooms will be convenient for me;' and the plaintiff had said: 'As there is to be no show, I want to use my rooms for business and don't want strangers coming in.' This will help us to see the justice of the court's conclusion. Accordingly the defendant was not liable for the balance of the agreed sum beyond the deposit he had paid: a counter-claim for the return of the deposit was abandoned, wisely, as is shown by the next case in the December Law Reports, Civil Service Co-operative Society v. General Steam Navigation Co. (1903), 2 K. B. 756, 72 L. J. K. B. 933, C. A., which arose out of the hiring of a steamer for the naval review. It was there held to be settled by authority that, when a contract is avoided by failure of its principal subject-matter—which failure, we must now understand, may or may not consist in the destruction or non-existence of a given physical object—'the loss must remain where it was at the time of the abandonment,' and neither party can recover anything. We doubt whether the resources of the common law were not, at one time, capable of a nearer approximation to perfect justice; but the court of appeal has fixed the rule, and such cases are not very common, and it is always open to parties to protect themselves by insurance or by special terms in the contract itself. But where a person minded to make profit by conveying passengers to see the naval review chartered a ship for that purpose, it was held, and by the same judges who decided Krell v. Henry, that this was an ordinary contract for the employment of the ship, with a specification of the voyage, and the venture was wholly the charterer's own and at his risk; and the ingenious argument that the ship never really existed 'as a review-visiting ship' was not accepted: Herne Bay Steam Boat Co. v. Hutton (1903), 2 K. B. 683, 72 L. J. K. B. 879, C. A. In point of fact, the fleet was still there, as STIRLING, L. J. observed.[1]

GRIGGS ET AL. v. AUSTIN ET AL.

3 PICK. (MASS.) 20.—1825.

ASSUMPSIT for money had and received and for money lent and accommodated.

PARKER, C. J.—This action is *indebitatus assumpsit* on money counts. It is brought to recover back a sum of money paid by the

[1] For other cases of disputed liability growing out of the postponement of events connected with the coronation, see Blakeley v. Muller and Hobson v. Pattenden, [1903] 2 K. B. 760; Clark v. Lindsay, 88 Law Times Rep. 198 (1903); Elliott v. Crutchley, [1904] 1 K. B. 565.

plaintiffs to the defendants for the freight of a number of barrels of apples taken on board their ship, the Topaz, bound from Boston to Liverpool. It is proved by the bill of lading signed by the master, and an account made out by the owners, with their receipt upon it, that the whole freight agreed upon was paid before the sailing of the vessel, and the report finds, that before the vessel arrived at her port of delivery abroad, she was stranded or wrecked on a beach within six miles of her port, by means of which a large portion of the plaintiffs' apples were destroyed, or rendered worthless by the salt water.

This brief statement presents the principal question which has been argued; there are other facts in the report material to some inferior questions, which will be stated in their proper place.

The plaintiffs contend that the consideration for the payment of the money was the agreement on the part of the owners to transport the apples in their ship to Liverpool; and that having failed to do this, they are bound in conscience to return the money; and that an action at law lies for it, upon the ground of failure of consideration. The defendants insist, that the payment of the freight in advance imposes all risks upon the owner of the goods, and that the failure of transportation and delivery having happened without their fault, there is no legal nor equitable principle which will oblige them to refund. Some reliance in support of their defense is placed upon the condition expressed in the bill of lading, that the goods are to be delivered safely, "the dangers of the seas excepted;" but as this condition has in practice been applied only to the contract in relation to the goods themselves, so as to protect the shipowner from a demand for their value in case of loss by perils of the sea, and has never been construed to bear upon the rights of the parties in relation to the freight, we cannot see anything in that instrument which can affect the question before us. This must stand upon the principles of marine or mercantile law, so far as they may have been recognized and adopted, or may be found agreeable to the rules and maxims of the common law.

It is certainly a clear principle of the common law, that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded on such consideration may be avoided between the parties to the contract. This general principle is the foundation of perhaps the largest class of cases which have been sustained under the action for money had and received. Exceptions may be made by a stipulation of the parties, but without such exceptions the rule seems to be universal.

And this broad principle of justice has been adopted in the marine law, in relation to this subject of freight, upon the continent of Europe, as is very fully proved by the researches made and the cases cited by Chief Justice KENT, in the case of Watson v. Duy-

kinck, 3 Johns. 335. It would be but an affectation of learning to go over the ground which has been so ably preoccupied in the opinion given in that case, especially as the same ground has been traversed by Mr. Justice STORY in a note in his edition of Abbott on Merchant Ships, etc., which note was avowedly supplied from the opinion of Chief Justice KENT above cited. I wish for one, since books are so prodigiously multiplied, to spare the profession and the public the expense of reiterated citations on points indubitably settled, when both text and comment may be found in almost every book in a lawyer's library. It is sufficient then to say, that by reference to the above-cited opinion and the note of Mr. Justice STORY, it will be found to be the established law of the maritime countries on the continent of Europe, that freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary. The commercial principle recognized by the continental nations is reduced into the form of a maxim in the Napoleon Code de Commerce, tit. 8, art. 302. "No freight is due for merchandise lost by shipwreck or stranding, plundered by pirates or taken by enemies. The master is bound to restore freight which shall have been advanced, if there is no agreement to the contrary." This, like most of the provisions in the modern French codes, is not the introduction of a new principle, but the new promulgation of antecedent law in a more convenient form, as was the case with the "Digest" and other works executed under the auspices of Justinian, of whom the emperor Napoleon was in this respect an imitator.

It is admitted in argument, that such is the law of the continental powers, but it is suggested that it has not been introduced into the English law, and, therefore, there is no evidence that it belongs to our common law. It is true there are few cases in the English books touching this point, but it is equally true that the principle has never been denied there; on the contrary, in the case cited from 1 Campb. Lord ELLENBOROUGH, who was a great mercantile judge, recognizes it in the full extent of the Code de Commerce; and the cases cited from 4 M. & S., 2 and 4 B. & A. and 5 Taunt. proceed upon the ground of a stipulation in the several contracts which were under discussion, similar to the exception in the continental rule above cited; and the *obiter* remark of Mr. Justice BAYLEY, in the case of De Silvale v. Kendall, that wherever there is an *express stipulation* that freight shall be paid in advance, there must be an express stipulation that it shall be recovered back if the goods be not carried, if such be the intention, will be found not to militate against the general principle.

A distinction was raised in the argument, between payment of freight and an advance of it, it being supposed to be recoverable back in the latter case, but not in the former. But we do not find this distinction supported by authorities, nor do we see any sound reason for it. We think an advance of freight means the same thing

as payment of freight beforehand or in advance, and whether the whole is paid or a part we think makes no difference.

In the English cases cited a very nice discrimination has been adopted between a contract for freight, which includes an obligation to transport and deliver, and a contract to receive the goods on board the vessel. That a contract of the latter nature may be made, so that it will be considered as executed by the mere lading of the goods, we do not doubt; but we cannot think that such a contract can be implied from the mere fact of the freight's being paid down, because reasons may and often do exist for exacting this, without any intention to vary the legal liabilities of the parties. If persons apply for a passage in a vessel, as is often the case between this country and Great Britain, whose responsibility may be doubtful, and they are received on board at the customary price on condition of advancing the passage-money, and the vessel should be wrecked immediately on commencement of the voyage, so that the passengers would have to seek another vessel and pay their passage-money again, we cannot think that the master or shipowner would have a right to retain the money, unless there were an express agreement to that effect. The case of Watson v. Duykinck above cited is somewhat of this nature. In that case the voyage was broken up two days after its commencement, and the passenger, instead of being carried to the Island of St. Thomas, was landed in Connecticut. He however was not allowed to recover back the passage-money which had been paid in advance, on the ground that the consideration was an agreement on the part of the master to suffer him to proceed in the sloop, etc., and that the master had suffered him to come on board, which was an execution of the contract. I confess this does not seem to me to be the most obvious effect of the contract; but it was by this construction only that the defendant prevailed, the court being clear that were it a common case of passage-money paid in advance, by the principles of the marine law, engrafted into the common law, it must have been recovered back. The same principle applies with equal force to money paid in advance for the freight of goods. Such payment does not import a relinquishment of any right, for it may have been exacted because the goods themselves might not be a sufficient security for the freight, and the owner of the goods might not be responsible. The case before us is likely to have been of that kind. Fruit was the subject of the contract; it was of a perishable nature and liable to great uncertainty as to its value in a foreign market; the owner of it may have been a person of no property; and for these reasons the payment down may have been exacted.

But one of the counsel for the defendant has put the case on ground which admits the general principle that freight may be recovered back when the goods are not delivered, unless there be an agreement to the contrary, but he insists that such an agreement does appear from the evidence, that is, from the bill of lading and the receipt on the account. But we think they furnish no evidence of

such an agreement; they merely prove that the freight was paid in advance. Indeed it will be seen at once, that if the payment of freight thus proved were to be construed into a stipulation that it should not be recovered back, the whole doctrine of the marine law on this subject would be useless. The maxim is, that freight paid in advance, if the goods be not carried, shall be returned, unless there be a stipulation to the contrary. Now if the mere payment proved such stipulation there would be no case for the rule to operate upon. So that when Mr. Justice BAYLEY says, that where there is an express stipulation to pay freight in advance, there must also be an express stipulation to pay it back in order to entitle the shipper to recover, he means something more than the mere payment of the freight, which may be equivocal. He means undoubtedly an express stipulation in the contract, because it might be inferred from such a stipulation that the parties had calculated hazards, and that an equivalent had been obtained in some form for the advance of money which otherwise would be due only on a contingency. And he was there reasoning upon a case which might fairly sustain such an argument.

It is said that the rate of exchange between this country and England gave an advantage to the plaintiffs which may have been the consideration for paying freight in advance. That fact does not appear in the report, and if it did it could not affect our decision. If the intent of the parties had been submitted to the jury, as was done by Chief Justice GIBBS in the case cited from 5 Taunt. 435, it might have been material, but we do not find that the fact was offered to be proved at the trial, so that we do not see that any use can now be made of it.

Judgment for the plaintiffs.[1]

BOSWORTH, J., IN PHELPS v. WILLIAMSON.

5 SANDF. (N. Y.) 578, 584.—1852.

IT is undoubtedly competent for the parties to contract upon any terms they may think proper; and the shipper may agree to pay freight in advance in consideration of the carrier's *promise* to receive the goods on board, and to *undertake* to carry and safely deliver them at some other port. In such a case the carrier is entitled to the freight according to the contract, and if the performance of the promise on his part becomes impossible by the act of God, he is excused from non-performance and the loss falls upon the shipper. This would be so on general principles applicable to all contracts

[1] Accord, Emery v. Dunbar, 1 Daly (N. Y. C. P.) 408 (1865). The same rule applies to passage money paid in advance. Brown v. Harris, 2 Gray 359 (1854).

where the thing done or money paid by the one party is the consideration of a promise of the other party to do something on his part. If performance becomes impossible through some overruling necessity, and without the fault of the party promising, the other party cannot recover back the money paid, nor for the thing done. It is also a well-settled principle of law, that where money is paid, or a promise made by one party in contemplation of some act to be done by the other, and the doing of which is the sole consideration of the right to receive payment or require a performance of the promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded on such consideration may be avoided between the parties to the contract.

In this case, by the settled principles of law, and the legal effect of the contract as evidenced by the bill of lading, the right to freight depended on the performance of the voyage and a delivery of the goods at San Francisco. The goods were not carried to that port. It was no fault of the shipper. After the contract had been made, and the legal rights and liabilities of the parties had become fixed, the shipper advanced the freight. The act, the doing of which entitled the defendants to it, has not been done. The defendants have not performed the acts, the performance of which was a condition precedent to their right to require payment. The consideration for the advance has failed, and the defendants must refund the money. STORY, J., in Pitman v. Hooper, 3 Sumner 66, comments on the case in 2 Shower R. 283, as one loosely reported, and not easily reconcilable with the strict principle, and declares his opinion of the law to be, that in the ordinary case of freight paid in advance, if the voyage is not performed, the shipper may recover it back, unless it was paid under an express agreement to the contrary. Ch. J. KENT, in Watson v. Duykinck, 3 J. R. 335, and in his Com., vol. 3, p. 226, lays down the rule of law applicable to this subject, as it was decided to be, in Griggs v. Austin, 3 Pick. 20; Mashiter v. Buller, 1 Camp. 84, is to the same effect.

ANONYMOUS.

2 SHOWER 283.—1683.

THIS was ruled by SAUNDERS, Chief Justice, on evidence in a trial at Guildhall.

First. Freight is the mother of wages, and wheresoever freight is due, wages is so.

Secondly. If a ship be lost before it come to a delivering port, no freight nor wages is due; if lost afterwards it is due to the last delivering port.

Thirdly. Advance-money paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it

come to a delivering port, yet wages are due according to the proportion of the freight paid before; for the freighters cannot have their money.[1]

---

e. Illegal Contracts.

i. *In General.*

WHITE v. FRANKLIN BANK.

22 Pick. (Mass.) 181.—1839.

By an agreed statement of facts, it appeared, that on the 10th of February, 1837, the plaintiff deposited with the defendants the sum of $2,000, and received from them a book containing the following words and figures, to wit:

"Dr. Franklin Bank in account with B. F. White, Cr. 1837, Feb. 10th. To cash deposited, $2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier."

It further appeared, that on the 7th of July, 1837, the plaintiff brought this action against the bank to recover the money so deposited by him, declaring on the money counts, and on an account stated. If the court should be of opinion, that the action could be maintained, the defendants were to be defaulted and judgment rendered for the sum of $2,000, with interest; otherwise the plaintiff was to become non-suit.

Wilde, J.—The first ground of the defense is, that the action was prematurely commenced. The entry in the book given to the plaintiff by the cashier of the bank, is undoubtedly good evidence of a promise to pay the amount of the deposit on the 10th day of August; and if this was a valid and legal promise, this action cannot be maintained. But it is very clear, that this promise or agreement that the deposit should remain in the bank for the time limited, is void by virtue of the Revised Stat. c. 36, sec. 57, which provides that no bank shall make or issue any note, bill, check, draft, acceptance, cer-

[1] In Byrne v. Schiller, L. R. 6 Exch. 319 (1871), the court says (pp. 325, 326): "It is settled by the authorities referred to in the course of the argument, that by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable. I regret that the law is so. I think it founded on an erroneous principle and anything but satisfactory; and I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity with the American doctrine and contrary to ours. In France and Germany the rule has been settled for long time. * * * * But whatever may be the true principle, I quite agree that the authorities founded on the ill-digested case in Shower (Anon., 2 Show. 283) are too strong to be overcome; and if the law is to be altered it must be done by the legislature and not by contrary decisions."

tificate or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, excepting for money that may be borrowed of the Commonwealth, with other exceptions not material in the present case. The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This therefore was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well-settled principle of law. It was fully discussed and considered in the case of Wheeler v. Russell, 17 Mass. R. 281; and the late Chief Justice, in delivering the opinion of the court, remarked, "that no principle of law is better settled, than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law." The same principle is laid down in Springfield Bank v. Merrick, 14 Mass. R. 322, and in Russell v. DeGrand, 15 Mass. R. 39. In Belding v. Pitkin, 2 Caines's R. 149, THOMPSON, J., said "it is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by the English authorities. In Shiffner v. Gordon, 12 East 304, Lord ELLENBOROUGH laid it down as a settled rule, "that where a contract which is illegal, remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it." It is therefore very clear, we think, that no action can be maintained on the defendant's express promise, and that if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendant's counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being *participes criminis,* no action can be maintained to recover it back. The rule of law is so laid down by Lord KENYON, in Howson v. Hancock, 8 T. R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when a contract is merely *malum prohibitum,* the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by COMYNS, in his treatise on contracts, will reconcile most of the cases which are apparently conflicting. "When money has been paid upon an illegal contract, it is a general rule, that if the contract be executed, and both parties are *in pari delicto,* neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of

such a contract, and, instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law, that the plaintiff should recover." 2 Com. on Contr. 109. The rule, with these qualifications and distinctions, is well supported by the cases collected in Comyns and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The first ground on which the plaintiff's counsel rely, in answer to the defendants' objection is, that there was no illegality in making the deposit, and that the illegality of the transaction is confined to the promise of the bank, and the security given for the repayment, that alone being prohibited by the statute. The leading case on this point is that of Robinson v. Bland, 2 Burr. 1077. That was an action on a bill of exchange given for money lent and for money won at play. By the St. 9 Anne, c. 14, it was enacted that all notes, bills, bonds, judgments, mortgages or other securities for money won or lent at play, should be utterly void. The court held, that the plaintiff was not entitled to recover on a bill of exchange, but that he might recover on the money counts for the money lent, although it was lent at the same time and place that the other money for which the bill was given, was won. The same principle was laid down in the cases of Utica Ins. Co. v. Scott, 19 Johns. R. 1; Utica Ins. Co. v. Caldwell, 3 Wendell 296; and Utica Ins. Co. v. Bloodgood, 4 Wendell 652. In these cases the decisions were, that although the notes were illegal and void as securities, yet that the money lent, for which the notes were given, might be recovered back. The principle of law established by these decisions is applicable to the present case. The only doubt arises from the meaning of the word "contract," in the prohibitory statute. But taking that word in connection with the other words of prohibition, we think it equivalent to the promise of the bank, and that the intention of the legislature was, to prohibit the making or issuing of any security in any form whatever, for the payment of money at any future day.

The next answer to the objection of the defendants' is, that although the plaintiff may be considered as being *particeps criminis* with the defendants, they are not *in pari delicto*. It is not universally true that a party who pays money as the consideration of an illegal contract, cannot recover it back. Where the parties are not *in pari delicto,* the rule *potior est conditio defendentis,* is not applicable. In Lacaussade v. White, 7 T. R. 535, the court says, "that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract." This principle, however, is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will

not undertake to ascertain the relative guilt of the parties, or afford relief to either. But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times. In the case of Smith v. Bromley, 2 Doug. 696, note, it was decided, that the plaintiff was entitled to recover in an action for money had and received, for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord MANSFIELD laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis.* But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterward adhered to and confirmed by the whole court, in the case of Jones v. Barkley, 2 Doug. 684.

On this distinction it has ever since been held, that where usurious interest has been paid, the excess above the legal interest may be recovered by the borrower in an action for money had and received. So, money paid to a lottery-office-keeper as a premium for an illegal insurance is recoverable back in an action for money had and received. Jaques v. Golightly, 2 W. Bl. 1073. But in Browning v. Morris, 2 Cowper 790, it was decided, that where a lottery-office-keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by St. 17 Geo. 3, c. 46, he cannot recover it back, though the premium of insurance paid by the insured to the lottery-office-keeper might be. The distinction, on which this case was decided, is very material in the present case. Lord MANSFIELD referred to the determination in Jaques v. Golightly, where it was said, "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office-keepers." And he adds, "it is very material that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side; upon the office-keeper. The man who makes the contract is liable to no penalty. So, in usury, there is no penalty upon the party who is imposed upon." The same distinction is noticed and enforced by Lord ELLENBOROUGH, in Williams v. Hedley, 8 East 378. In that case it was decided, that where money was paid to a plaintiff to compromise a *qui tam* action for usury, it might be recovered back in an action for money had and received; because the prohibition and penalties of the St. 18 Eliz., c. 5, attached

only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, etc." It was argued for the defendant in that case, "that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute, it was so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object, and that if he was not therefore to be considered as strictly *in pari delicto* with the plaintiff in the *qui tam* action, he was at any rate *particeps criminis,* and in that respect not entitled to recover from his co-delinquent, money which he had paid him in the course and prosecution of their mutual crime." This argument was overruled, and Lord ELLENBOROUGH fully approved the doctrine laid down by Lord MANSFIELD in Smith v. Bromley, and the decisions in the several cases in which that doctrine had been confirmed. The same distinction has been recognized in other cases, and was adopted by this court in Worcester v. Eaton, 11 Mass. R. 376, in which PARKER, C. J., after referring to the above cases, said: "This distinction seems to have been ever afterwards observed in the English courts, and being founded in sound principle, is worthy of adoption, as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly leveled against the bank, and not against any person dealing with the bank. In the words of Lord MANSFIELD, "the statute itself, by the distinction it makes, has marked the criminal." The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter. To decide that this action cannot be maintained would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another ground on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract, or rather to treat it as a void contract, and to recover back the consideration money. It was so decided in Walker v. Chapman, Lofft 342, where money had been paid, in order to procure a place in the customs, but the place had not been procured; and in an action brought by the party who paid the money, it was held, that he should recover, because the contract continued executory.[1] This case was cited with approbation by BULLER, J., in Lowery v. Bourdieu, 2 Dougl. 470, and the distinction between contracts executed and executory, he said, was a sound one. The same distinction has been recognized

[1] Compare Liness v. Hesing, reported herein post p. 249.

in actions brought to recover back money paid on illegal wagers, where both parties were *in pari delicto*. The case of Tappenden v. Randall, 2 Bos. & Pul. 467, was decided on that distinction. HEATH, J., said, "it seems to me that the distinction adopted by Mr. Justice BULLER between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there ought to be *locus poenitentiae,* and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 T. R. 405; 1 H. Bl. 67; 7 T. R. 535; 3 Taunt. 277; 4 Taunt. 290. In the case of Aubert v. Walsh, 3 Taunt. 277, the authorities were considered and the law was definitely settled as above stated; and it does not appear that it has ever since been doubted. In Utica Ins. Co. v. Kip, 8 Cowen 20, the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is, however, denied by the defendants' counsel that the contract in question was executory, within the true intent and meaning of these decisions and the doctrine now laid down. This question has not been much discussed, and it is not necessary to decide it in the present case, the court being clearly of opinion that the plaintiff is entitled to recover on the other grounds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should not be supposed to be doubtful in our opinion, which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is, whether the plaintiff was bound to make a demand on the bank before he commenced his action. The general rule is that where money is due and payable, an action will lie without any previous demand. But where money is deposited in a bank in the usual course of business, we should certainly hold that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, there can be no good reason given why the bank should be exempted from the operation of the general rule. In Clark v. Moody, 17 Mass. R. 145, it was held, that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without a demand. If the defendants had sold to the plaintiff a post-note payable at a future day, it could hardly be doubted that an action would lie to recover back the consideration money, without any previous

demand; and there seems to be no substantial distinction between such a case and the one in question.

Judgment on default.[1]

STACY v. FOSS.

19 ME. 335.—1841.

ASSUMPSIT, to recover the sum of twenty-five dollars, deposited with the defendant by the plaintiff, as a stakeholder, on a bet on a horse-trot.

WESTON, C. J.—It is conceded that the bet out of which this controversy grew is not a valid contract. And it has been decided by this court that all wagers in this state are unlawful. Lewis v. Littlefield, 15 Maine R. 233. The action, however, is resisted on the ground that the stakeholder is a party to the unlawful contract, and that both plaintiff and defendant being *in pari delicto,* the law will lend its aid to neither. And a distinction is taken between notice to the stakeholder, repudiating and disaffirming the contract, before and after the happening of the event, upon which the wager is made to depend.

When the money has once been paid over to the winner, unless where made recoverable by statute, the parties being clearly *in pari delicto,* no action can be maintained to recover it back. Howson v. Hancock, 8 T. R. 575; McCullum v. Gourlay, 8 Johns. 147. But where the money has not been paid over by the stakeholder, although it has been lost by the happening of the event, it has been held, that upon notice and demand the stakeholder is liable to the loser for the amount by him deposited. Cotton v. Thurland, 5 T. R. 405; Lacaus-

[1] Accord, Smart v. White, 73 Me. 332 (1882), and Tracy v. Talmage, 14 N. Y. 162 (1856), in both of which cases the authorities are reviewed, and in which latter case the rule is stated as follows (p. 181):

"It was insisted by the counsel for the receiver, upon the argument, that *in no case* would relief be afforded to any party to an illegal contract, unless he applied for such relief, or, at least, had elected to disaffirm the contract while it remained *executory.* This position cannot, I think, be sustained. It overlooks distinctions which are clearly settled. The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto,* form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential, to both classes, that the contract be merely *malum prohibitum.* If *malum in se,* the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves *moral turpitude* nor violates any *general* principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: 1. Where he is not *in pari delicto;* or, 2. In some cases where he elects to disaffirm the contract while it remains *executory.* In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second, it is equally unimportant that the parties are *in pari delicto.*"

See Eastern Metal Co. v. Webb Co., 195 Mass. 356 (1907), where recovery was allowed for benefits conferred by performance of the non-prohibited part of an entire contract, there being no performance of the prohibited part.

sade v. White, 7 T. R. 535. The case of Yates v. Foote, 12 Johns. 1, has been cited for the defendant, where it was held that after the event has happened no action will lie by the loser against the stakeholder, upon notice and demand, while the money remains in his hands. And in McKeon v. Caherty, 3 Wend. 494, the law is stated to have been thus settled, by the case of Yates v. Foote. That was a decision of the court for the correction of errors, fifteen to six, against the unanimous opinion of the Supreme Court, delivered by Chief Justice KENT. It was one of five cases depending upon the same facts and principles, in one of which, Vischer v. Yates, 11 Johns. 23, the judgment of the Supreme Court is reported. KENT, C. J., there reviews the English cases, and he thence deduces that an action may be maintained against the stakeholder, upon notice and demand, before he pays over the money, as well after as before the happening of the event. To this result, as sound and correct, is added the undivided opinion of the Supreme Court of New York. The rule, that no action lies where the parties are *in pari delicto,* was interposed. The learned Chief Justice says, "this objection is applied exclusively to the suit against the principal or winner; and there is no instance in which it has been used as a protection to the intermediate stakeholder, who, though an agent in the transaction, is no party in interest to the illegal contract." It best comports with public policy, to arrest the illegal proceeding before it is consummated, and, in our judgment, the opinion of the Supreme Court is better sustained, upon principle and authority, than that of the court of errors. The non-suit, ordered by the court below, is not warranted by the law of the case.

Exceptions sustained.[1]

[1] In Bernard v. Taylor, 23 Ore. 416 (1893), plaintiff deposited with defendant $560, for the benefit of Grant, who was to compete with Anderson in a foot race which was known by plaintiff and the rest of the above persons to be a "bogus" race for the purpose of "roping in" somebody. Before the time appointed for the race, plaintiff demanded back his money, defendant refused, and plaintiff sued and was allowed to recover it. And after the pretended race was run the victim was allowed, in a tort action, to recover his money, in Hobbs v. Boatright, 195 Mo. 693 (1906); Stewart v. Wright, 147 Fed. 321 (1906); Lockman v. Cobb, 77 Ark. 279 (1905). See also 21 Har. L. Rev. 60.

The right of recovery of money or property by a loser on a gaming contract is sometimes much enlarged by statute. See, for example, New York Penal Law, §§ 993-995.

KNOWLTON v. CONGRESS & EMPIRE SPRING CO.

57 N. Y. 518.—1874.

DEFENDANT was a corporation. Its trustees passed a resolution to increase its capital stock, certificates to be issued as for full-paid stock when 80 per cent. of the subscription was paid. A subscription agreement binding the subscribers to take stock and pay $80 per share of $100, in instalments as called for, and on failure to submit to forfeiture, was prepared and signed by S. on behalf of plaintiff. Plaintiff was trustee of defendant, was active in devising the scheme and in procuring subscribers. He paid in 20 per cent. on said subscription, but did not pay subsequent calls, and in consequence, by resolution of the board of trustees, the stock was declared forfeited. Subsequently, at a meeting of the stockholders, it was resolved to reduce the stock to its original amount, to settle with the subscribers for the new stock and to retire the same. Bonds of the company were issued and delivered for that purpose; none were tendered to or demanded by plaintiff. This is an action brought by him to recover the amount paid. Judgment in favor of plaintiff, entered on the report of a referee.

The report of the referee, substantially, finds that he considered any plan or scheme by which the actual amount of the capital of company, incorporated under the act passed February 17, 1848, entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes" (being the act as subsequently extended in its objects, under which the defendant was incorporated), is made less than the nominal amount thereof, whether as originally fixed or subsequently increased, violates the spirit and policy of the law, if not the express provisions thereof applicable to the subject, from its tendency, when carried out, to deceive the public and prejudice the stockholders not assenting to it; and he came to the conclusion, upon facts then disclosed in the case, that the scheme for the increase of the capital stock of the defendant was constructively fraudulent as to the public and as to all stockholders not assenting thereto, and therefore illegal. He then concluded that the plaintiff, virtually, receded from the contract, by refusing to pay calls; that it was then still executory, and that the plaintiff might repudiate it and maintain an action for the money paid

under it. Those views were adopted by him in his opinion, given on rendering his final report and decision; and he therein further states that the evidence fails to establish an actual intent on the part of the defendant to defraud; and he also exonerates the plaintiff from intentional fraud in his action in the advancement of the scheme.

REYNOLDS, C.—* * * * I do not think it of much consequence to the present question that the defendant abandoned the effort to increase its stock as originally proposed by the plaintiff. The infirmity, if there be any in the plaintiff's case, is, that he was a party to an illegal transaction, and the money sought to be recovered was connected with the illegality, and intended to aid in promoting the fraudulent enterprise. It is urged, on behalf of the plaintiff, that he was not *in pari delicto;* that the corporation was the more guilty party; that he was but one of a number of directors and did not control the action of the company, and that he repented in due season. I find it difficult to see the force of this argument. He was one of several officers of a corporation engaged in an illegal act, and he may be no worse off in the law, even if he was the inventor of the illegal scheme, but he was in complicity with all his associates in the direction of the corporation. The invisible and intangible legal existence, called the corporation, had neither body, soul nor sense, and in itself was utterly incapable of conceiving a fraud or doing an illegal act. It could only be moved to wrong by the acts of its managers, and if they all concocted or connived, and sought to consummate an illegal transaction, they all come within the unbending rule that every court declines to give its aid, in any form, to parties thus conditioned, either to enforce an executory contract or disturb one executed. Such parties are left in the position they have placed themselves. It is said the plaintiff repented in season. Repentance for transgression of any kind is always to be commended, but in cases like this the courts do not accept it to relieve the sinner. If he has been concerned in an illegal enterprise, abhorred by the law, and parted with his money on such a hazard, no amount of repentance will induce a court to give its aid to rescue it from the toils by which it is detained. The learned counsel for the plaintiff obviously felt the force of this rule of law, when he suggested that the corporation was the more guilty party. No guilt can be imputed to the corporation save that imposed by the plaintiff and his associates. And, again, it is said that the plaintiff rescinded his illegal contract and was entitled to recover back what he had paid. There is no such rule in a case like this. A party defrauded may, on the discovery of the fraud, rescind a contract to recover back what he has paid upon it. But one of several parties to a fraud, after he has parted with his money to promote the fraudulent scheme, may not, at any time, rescind and recover it back.

As before suggested, it is very earnestly insisted that in this case the plaintiff's illegal contract remained executory, and that he rescinded or repented in due time before it was completely executed, and was therefore entitled to recover back so much as he had already

paid in furtherance of an illegal transaction. I am quite aware that cases can be found in the books where this distinction has been acted upon, but they will be found, on examination, mainly exceptional in their character. In our law, the general rule is, that no court will give its aid to any party engaged in an illegal transaction, to recover anything which has been devoted to such a purpose. Where the illegal and immoral scheme has been fully consummated, no one doubts the application of the rule. It has been, however, and is now suggested, that if a party only goes half way and then repents, he may have relief in the courts, on the ground of his repentance, before the eleventh hour. This view can only proceed upon the ground that the law indulges in some mathematical exactness in the degrees of criminality, and that the smaller sinner may be saved, while the larger one meets with a different destiny. It therefore appears to me that, in cases like the one at bar, there can be no logical or legal distinction made between a contract executory or executed, as I think my brother, LOTT, has shown by a special reference to adjudged cases, which I do not think necessary now to review or consider. The principle which underlies the whole question is, to my mind, very apparent.

We are referred to cases where corporations have done acts, such as the making of contracts and the issuing of bills as money, entirely beyond their authority, but in fact prohibited by positive law, and where a remedy, by third parties has been had against them in the courts; but they give no support to the plaintiff's claim in this case, for here the illegal or guilty act of the corporation was also the illegal or guilty act of the plaintiff, by whom, with his associates, the corporation was debauched. The case of Thomas v. The City of Richmond (12 Wallace (U. S.) 349) was a case where a third party had received bills, issued as currency in violation of law, and the plaintiff was not permitted to recover. Mr. Justice BRADLEY, in that case, says (p. 356): "The issuing of bills as a currency by such a corporation, without authority, not only contrary to positive law, but, being *ultra vires,* is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto,* with the *officers,* and should have no remedy, even for money had and received, in which he has aided in inflicting the wrong. The protection of public corporations, from such unauthorized acts of their officers and agents, is a matter of public policy in which the whole community is concerned, and those who aid in such transactions must do so at their peril." It need not be suggested with how much greater force this doctrine applies against one of the guilty officers of the corporation. Without pursuing the subject further, I think the judgment of the court below should be reversed and a new trial granted.

[There was a dissenting opinion by DWIGHT, C.;[1] and an opinion by LOTT, Ch. C., in concurrence with that of REYNOLDS, C., *supra.*][2]

THOMPSON v. WILLIAMS.

58 N. H. 248.—1878.

ASSUMPSIT for $75, the price of two cows sold by the plaintiff to the defendant on Sunday. Fifteen days after the sale the plaintiff took the cows from the defendant, claiming that the title was not to pass until the price was paid. For that taking the defendant brought an action of trespass against the plaintiff, and recovered a judgment (the damages being assessed at $75) on the ground (as the record shows) that the cows were the property of the defendant by virtue of the sale on Sunday, and the sale was absolute. That judgment the plaintiff has satisfied.

The defendant moved for a non-suit, on the ground that the sale was prohibited by the Sunday law, Gen. St. c. 255, s. 3. The court denied the motion, and the defendant excepted. The plaintiff claimed that the Sunday law is not a defense in this case, and that the defendant, having asserted and maintained his title under the Sunday sale in the former suit, is estopped in this action to set up the defense of Sabbatical illegality. Verdict for the plaintiff.

[1] The dissent of DWIGHT, C., is upon three grounds: 1. That the agreement was not illegal but merely void, because it was *"ultra vires*, or beyond the capacity of the corporation to make"; 2. That even if illegal it was "executory," and "remained in part unexecuted"; 3. That defendant "rescinded the whole scheme," "accordingly there never was any stock," therefore the consideration wholly failed and hence plaintiff must be permitted to recover.

[2] After the foregoing decision, the case was removed to the United States Circuit Court and, going thence on writ of error to the United States Supreme Court, is reported *sub nom.* Spring Co. v. Knowlton, in 103 U. S. 49 (1880). The federal Supreme Court reached a conclusion contrary to that of the New York commission of appeals, WOODS, J., saying (p. 57): "It does not appear that the steps necessary, under the law, to an increase of stock were ever taken. Neither does it appear that any scrip or certificates were ever issued to the subscribers to the new stock. So that all that was done amounted only to a proposition by the company, on the one hand, to increase its stock, and an agreement by Knowlton to take certain shares of the new stock when issued, and the payment by him of an instalment of twenty per cent. thereon. There was no performance of the contract whatever by the company, and only a part performance by Knowlton. It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud. The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered, the other party not having performed the contract or any part of it, and both parties having abandoned the illegal agreement before it was consummated. We think the authorities sustain the affirmative of this proposition."

SMITH, J.—* * * * The defendant is not estopped by the judgment in the trespass suit from setting up the Sunday law as a defense. The maxim, *in pari delicto,* etc., was not established for the benefit of one party or of the other. The law does not leave the weaker at the mercy of the stronger, nor give the vendor a remedy by allowing him to retake the property illegally sold. It leaves the parties where their illegal contract left them; when executed, it will not assist the party who has parted with his money or property to recover it back; when executory, it will not compel performance. It would not leave the parties where their illegal contract left them if it did not maintain the title acquired by the contract. Williams was in possession of the cows, as of his own property, by the assent of Thompson. When the latter retook them Williams was enabled to maintain trespass because Thompson could not be heard to controvert his title. Smith v. Bean, 15 N. H. 579; Coburn v. Odell, 30 N. H. 540, 552. The verdict must be set aside.

Non-suit.

BROWN v. TIMMANY.

20 OHIO 81.—1851.

ASSUMPSIT. The jury returned a verdict for defendant. The plaintiff and defendant made an agreement, *on Sunday,* whereby the defendant was to deliver to the plaintiff a yoke of oxen in exchange for a colt of the plaintiff and five dollars "boot-money." At the time of making the agreement, the plaintiff paid to the defendant the five dollars, and the defendant was to bring the oxen to the plaintiff's house on the next day and take away the colt. If he failed to do so he was to forfeit and pay to the plaintiff one dollar. The *date* of the contract is not disclosed in the bill of exceptions. The defendant wholly failed to fulfill said agreement. He would neither deliver the oxen nor receive the colt. This action was brought to recover back the money paid.

SPALDING, J.—In Sellers v. Dugan, 18 Ohio 493, this court, with one dissenting voice, decided that an ordinary contract, made in the course of business, on a Sunday, is void, and that no action can be sustained to recover damages for the breach of such a contract. The question whether money paid on the contract could be recovered back in an action of assumpsit, was not submitted, much less determined, in that suit. The question is directly presented for adjudication in the case at bar, and we have no hesitation in saying that the court of common pleas erred in its instructions to the jury. We have declared that a business contract, made on Sunday, is void. Neither party will receive the aid of the court, while seeking to enforce performance of the agreement, or to recover damages for its breach.

Nor would we help either party to rescind, if the agreement was

wholly executed, upon the principle applicable to parties *in pari delicto.*

Where, however, as in this case, money had been advanced in part performance of a void contract, and either party sees fit to put an end to its further fulfillment, the amount paid may be recovered back, in *indebitatus assumpsit,* as for money had and received. In the present case, the agreement had never been wholly executed. The plaintiff paid to the defendant five dollars in money, and the defendant agreed to deliver to the plaintiff on the next day, a yoke of oxen, and to receive a colt in exchange. The defendant refuses to deliver the oxen, on the ground that he entered into the contract on a Sunday, and it is void. So far he is sustained by the law. But if he repudiates and refuses to execute the agreement, on the ground that it was a business transaction on the Sabbath, and consequently void, upon what pretense of right can he withhold from the plaintiff the money that he advanced upon the faith of that agreement? He has put an end to the execution of the contract as he had a legal right to do. He now holds five dollars of the plaintiff's money without consideration, and is, *ex aequo et bono,* under as great obligation to refund it as if he had accidentally found it on Sunday. The well-settled rule of law undoubtedly is, that where money has been paid in pursuance of an illegal contract that remains executory, it is recoverable in an action for money had and received to the use of the party paying it. *Aliter,* when the agreement is executed.

The judgment of the common pleas is reversed with costs.[1]

HENTIG v. STANIFORTH.

5 M. & S. (K. B.) 122.—1816.

Lord Ellenborough, C. J.—This was an action for money had and received, to recover back the premium that had been paid on a policy of insurance. The cause was tried before me at Guildhall, and the facts as stated by the plaintiffs' counsel, and which were admitted without proof, were these: The policy was dated on the 20th of November, and was on goods at and from Riga to Hull. The ship, which was a Swedish ship, was chartered for the voyage; and by the terms of the charter-party a British license for the voyage was to be procured. On the 3d of September a letter was written and sent from Riga to the agent of the assured in England, directing him to procure a license and to effect insurance. The letter was

[1] In Troewert v. Decker, 51 Wis. 46 (1881), it was held that where money was borrowed on Sunday, with a promise to repay it, the contract was illegal; and that "the mere fact that a person borrowing money on Sunday retains it and converts it to his own use, does not raise an implied promise, binding in law, and upon which an action can be maintained."

delayed beyond the usual time by contrary winds, and was not received till the 5th of October. On the 7th of October a license was obtained. The ship sailed from Riga on the 3d. It was objected, that this was an illegal voyage, by the stat. 12 Car. 2, c. 18, s. 8, the ship being Swedish, and the goods the produce of Russia, and that the plaintiff being *particeps criminis* could not recover back the premium. A verdict was taken for the plaintiff, with liberty to the defendant to move to set it aside and enter a non-suit. Such a motion was accordingly made, and a rule to show cause granted, and the matter has been argued.

Upon consideration, we think the plaintiff is entitled to recover back the premium, on the principle of the decision of Oom v. Bruce, 12 East 225. The objection is, that the contract was illegal, the voyage insured being for the conveyance of Russian commodities from Russia to England in a Swedish ship, and so contrary to the navigation act, 12 Car. 2, c. 18, s. 8; and that the plaintiff being *particeps criminis* cannot recover back the money paid on the illegal consideration. But before the time of this insurance, a statute had passed enabling His Majesty to legalize such a voyage by license; and in fact a license had been granted before the policy was effected, though not until four days after the ship sailed, the ship having sailed on the 3d of October, and the license being dated on, and expressly made to be in force from the 7th of that month. The ship having sailed before the license was granted, it has been decided, and rightly so, that the policy was void. No risk, therefore, was ever incurred by the underwriter, and if he can retain the premium he will retain it for nothing. But though the license was not actually obtained until the 7th of October, it was always in the contemplation of the parties, that a license should be obtained; the charter-party provides for it, and a letter directing it to be obtained was sent from Riga, on the 3d of September, which, according to the ordinary course, might be expected to have arrived in England in time for a license to be procured before the third of October, the day of the ship's departure. If the license had been obtained before the ship's departure, the voyage would have been legal. The plaintiff residing abroad had reasonable ground to suppose that the license would be obtained before the ship sailed: he contemplated a legal and not an illegal voyage. His agent in England knew that the license was obtained, but was ignorant of the time of the ship's departure; he also contemplated a legal and not an illegal voyage. The illegality depended upon a fact, viz., the posteriority of the license to the ship's departure, which was not known to the parties, and was contrary to the opinion and expectation that the plaintiff might reasonably entertain. In this respect, the present case is in principle the same as Oom v. Bruce; there the illegality of the voyage arose out of the commencement of hostilities on the part of Russia, which was a fact unknown to the plaintiffs when they effected the policy. It was urged in argument, for the purpose of distinguishing the two cases, that here the voyage was *prima facie*

illegal, because a license was necessary to legalize it. But there is nothing of illegality apparent on the face of the policy, and as far as the plaintiffs' knowledge of the facts, coupled with the circumstance of the expected license, appears to have extended, he had a right to suppose that the voyage would be legal: there was no illegality apparent to him or to his agent. We think, therefore, that this distinction does not exist. But the case is plainly distinguishable from all the cases cited on the part of the defendant, wherein the return of premium was called in question. In Toulmin v. Anderson, 1 Taunton 227, no question on the return of premium was ever made. In all the other cases cited the voyages were illegal; and there was not in any one of them any state of facts, either actually existing or supposed to exist, that could render it legal. In the present case, a state of facts was supposed to exist, and reasonably so supposed, under which, if the expectation of the parties had been realized, the voyage would have been legal. Unfortunately for the plaintiff his expectation was disappointed, and he lost the benefit of his insurance; but he contemplated a legal voyage and a legal contract. And we think, therefore, that he is not a party to a violation of the law, and is entitled to recover back his premium, as money paid without any consideration.

Rule to be discharged.[1]

SKINNER v. HENDERSON.

10 Mo. 205.—1846.

Scott, J.—This was an action of assumpsit on the general counts brought by Skinner against Henderson, in which Skinner submitted to a non-suit, and after an unsuccessful motion to set it aside, has brought the cause to this court. Henderson, it seems, by deed, leased to Skinner a right of pre-emption he possessed on the public lands, for the term of ninety-nine years, for a large sum of money. The object of the lease was to evade the act of congress prohibiting the sale of a pre-emption right until the issuance of a patent therefor. Understanding afterward that such an agreement was not valid, the parties mutually consented that the lease should be burned, which was accordingly done and the contract was considered rescinded by them. In the meantime Skinner had made large payments to Henderson under the lease, and this suit was brought to recover them. On the trial a copy of the lease was offered in evidence, and several receipts for money under the contract by Henderson; all these papers were excluded by the court, and this action of the court is the error complained of.

The rule in respect of money paid on illegal contracts appears in general to be, that money so advanced may be recovered in an action for money had and received, while the contract remains ex-

[1] In Marling v. Ins. Co., 19 Ohio Dec. 55 (Hamilton Common Pleas, 1908), plaintiff insured her husband's life without his consent. Later she learned that such consent was necessary, but concealed the want of it from the insurance company. Later she sued to recover back the premiums paid and recovery was denied, she being held estopped by her concealment. See note, 8 Col. L. Rev. 665.

ecutory, because a violation of the law is thereby prevented; but if a contract be executed, it cannot be recovered back. When both parties are *in pari delicto, melior est conditio defendentis,* not because he is favored in law, but because the plaintiff must draw his justice from pure sources. Buller's N. P. 132; Doug. 470. Here the contract was not executed, the parties availed themselves of the *locus poenitentiae,* and rescinded their bargain, consequently the money paid under it may be recovered. It may be remarked in regard to the refusal to admit secondary evidence of the deed, that it is by no means a matter of course to permit a party to give secondary evidence of the contents of an instrument, although the fact of its destruction is clearly proved. A party who will voluntarily, and without cause, deprive himself of original evidence, will not be permitted to use the secondary. The deed being destroyed with mutual consent of parties, and with a view to rescind an unexecuted contract which they learned was illegal, the authorities will amply sustain under such circumstances the introduction of secondary evidence. Riggs v. Taylor, 9 Wheat. 483. The evidence of the execution of the deed was sufficient to have permitted it to go to the jury. * * * * The judgment will be reversed and the cause remanded.

---

ii. *Par Delictum.*

HARSE v. PEARL LIFE ASSURANCE CO.

[1904] 1 K. B. 558.

In April, 1889, a proposal was made to the plaintiff, by an agent of the defendant insurance company, that he should effect an insurance with the defendants upon the life of a relative. The plaintiff agreed to insure the life of his mother, who was residing with him as his housekeeper, and to whom he made a money allowance. In the proposal form the pecuniary interest in the life insured was stated to be, "Son for funeral expenses." The plaintiff's father was alive, but he was paralyzed and unable to earn any money, and would not be in a position, in the event of his wife predeceasing him, to pay for her funeral expenses. Subsequently the plaintiff was induced by the defendants' agent to effect a second policy with the defendants upon his mother's life. The proposal form of that policy was signed with the name of the mother, but the plaintiff stated that the policy was effected for his benefit, and the premiums were paid by him. The mother, in giving her evidence, denied that she had signed the proposal form.

In 1902 the plaintiff, being informed that the policies were void for want of insurable interest, brought the action in the Oxford county court to recover the premiums paid by him under the two

policies during the preceding twelve years, amounting to £43 8s. At the trial the judge left the following questions to the jury: (1) "Had the person, for whose benefit the assurance was really made, a real pecuniary interest under either policy?—Yes. (2) Did the agent in either case make a statement which was false in fact? If so, what was it?—No. (3) Did the agent in either case know that what he was saying was untrue?—No. (4) Was either policy, or were both, taken out in consequence of what the agent had said?—Yes. (5) Did the agent in either case represent that the policy had been a good one?—Yes. (6) Were the agents in what they did, or was either of them, guilty of any fraud, and, if so, in what respect?—No." The jury were unable to agree whether the mother signed the proposal form. The county court judge held as a matter of law that under the circumstances the fact that the plaintiff would morally be bound to pay for his mother's funeral expenses, failing the ability of his father to pay for them, gave rise to a sufficient pecuniary interest to satisfy the statute of 14 Geo. 3, c. 48; that the first policy was consequently good, and the premiums paid under it could not be recovered back. He also held with regard to both policies that, even if they were void for want of insurable interest, the premiums could not be recovered back, for the parties were *in pari delicto*, the representation of the agent as to the validity of the policies being a representation as to a matter of law, and having been innocently made. He accordingly gave judgment for the defendants. The plaintiff appealed.

The Divisional court held that the fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life; and, as to both policies, that, as the plaintiff was entitled to assume that the defendants' agent would have a knowledge of insurance law, the parties were not *in pari delicto*, and the premiums could consequently be recovered back.

Judgment was accordingly given for the plaintiff.[1] The defendants appealed.

ROMER, L. J.—* * * * Assuming that the two policies were void because they were illegal, it is clear that the plaintiff cannot recover the premiums that he has paid unless he can make out that he is not *in pari delicto* with the defendant company. Can he be said to have established that position? To do this, reliance is placed on the statements made by the agent of the company. In my opinion there was no misstatement of fact, and it is further clear that there was no fraud—that it was not a case of oppression or duress, and that it was not a case of an advantage taken by a clever man over an ignorant one. The agent, like the plaintiff, had forgotten or mistaken the law. The finding of the jury amounts to this—that the agent had the belief that the policies were good. Unless it can be

[1] [1903] 2 K. B. 92.

said that the statements made by the agent put the defendants in a worse position than the plaintiff, the parties were on an equal footing with regard to the transaction. I do not think the statement had that effect, nor do I think that agents of insurance companies must be treated as under a greater obligation to know the law than ordinary persons whom they approach in order to effect insurances. It appears to me that the parties must be taken to have been *in pari delicto,* and that the company cannot stand in a worse position than their agent. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

[There was also a concurring opinion by COLLINS, M. R.; MATTHEW, L. J., concurred, without opinion.][1]

AMERICAN MUTUAL LIFE INSURANCE CO. v. BERTRAM.

163 IND. 51—1904.

THE appellant company issued a policy to Stiles upon the life of Mrs. Ellsworth. Stiles had no insurable interest in her life, and she did not consent to the issuing of the policy. These circumstances made the policy illegal both at common law and by statute. The agent of the company, to whom all the circumstances were known, induced plaintiff (appellee), who had no insurable interest in the life of Mrs. Ellsworth, to take an assignment of the policy from Stiles. Thereafter plaintiff paid the assessments upon the policy until October, 1897, when and afterward the company refused the plaintiff's tender of assessments. Plaintiff later demanded back the sums plaintiff had previously paid to the company, and the demand being refused, brought this action against the company.

DOWLING, J.—* * * * The present suit is not brought to enforce the illegal contract of insurance, or any right arising out of it. The appellee seeks only to recover from the appellant moneys paid by her to it without any consideration whatever. For, as the policy on the life of Mrs. Ellsworth was void from its inception, the appellant never incurred any risk, and the appellee never could have derived any benefit from it. At the time of the assignment of the policy, and immediately previous thereto, Gusten, acting as the agent of the appellant, and knowing all the facts which rendered the

[1] Further as to parties not being *in pari delicto,* see cases post, p. 508, on the recovery of money paid as usurious interest.

The doctrine, par delictum, is said not to be of universal application, but "subject to the exception that where public interest requires its [the court's] intervention, relief will be granted though the result may be that the property will be restored to, or a benefit derived by a plaintiff who is in equal guilt with the defendant. In such cases the guilt of the respective parties is not considered by the court which looks only to the higher right of the public, the guilty party to whom relief is granted being only the instrument by which the public is served. Courts are and should be cautious in affording relief * * * under this exception." O'Connor v. Ward, 60 Miss. 1025, 1037 (1883). Upon this point, see further Gilchrist v. Hatch, 183 Ind. 371 (1915); Hobbs v. Boatright, 195 Mo. 693 (1906); 9 Cyc. 550 (n. 58), 551 (n. 59); 15 Amer. and Eng. Encyc. 1007 (n. 4); 15 Col. L. Rev. 175.

policy void, for the purpose of inducing the appellee to take an assignment of the policy, falsely and fraudulently represented to her that the policy was valid, that she would be entitled to recover payment thereunder in case of loss, and that the assignment would be a good investment for her. The appellee, who was a woman, believed these representations, and was induced by them to take an assignment of the policy from Stiles, and to reimburse him for his entire outlay up to that time. She also agreed to pay all future premiums and assessments. Within two months after the assignment was made, and when she had paid a comparatively small amount on the policy, Barney, the vice-president and treasurer of the appellant, acting for it, visited the appellee at her home, and, when told by her what Gusten had said to her, with a full knowledge of the facts, also falsely represented to the appellee that the policy was perfectly right, and advised her to go on and keep her dues paid up. Relying on these false statements, the appellee paid to the appellant premiums and assessments on the void policy to the amount of $1,574. It cannot be said that the parties to this transaction were *in pari delicto,* or that the appellant ought, in good conscience, to retain the moneys paid to it by the appellee. The representations made to the appellee by the officers and agents of the company—one of them being its vice-president and treasurer—were calculated to impose upon and mislead any one contemplating the purchase of a policy previously issued by the company. The parties did not stand upon an equal footing, and the officers and agents making the false representations to the appellee had every advantage over her which their special knowledge of the facts of the case, and of the law of insurance applicable to their company, could give. We think, too, that these representations that the policy was valid and would be paid were equivalent to a statement that it had been issued with the knowledge and consent of Mrs. Ellsworth, and that Stiles had such an interest in her life, as creditor or otherwise, as authorized him to take it out, so that the mistake of the appellee, occasioned by the fraudulent representations of the appellant's officers and agents, may be fairly regarded a mistake of fact as well as of law. The direct result of this mistake was that the appellee assumed obligations to pay the premiums and assessments on the policy, and that she parted with her money in discharging them.

In this connection, the fact is not to be overlooked that section 9 of the act of 1883 makes it a criminal offense for any person to secure a policy on the life of another without his knowledge or consent only when such act is done knowingly. The court expressly found that, in taking the assignment of the policy, the appellee was ignorant of the facts which rendered it void.

Our conclusion upon this branch of the case is that the appellant cannot, in good conscience, be permitted to retain the premiums and assessments paid to it by the appellee, and that she has the right to recover the same in this action.

A distinction between a mistake of law, affecting mere private rights, and such a mistake when the transaction is illegal by statute or is against public policy, may exist, as contended for by counsel for appellant; but, giving to this distinction its fullest effect, it could not, under the circumstances of this case, as shown by the special finding, defeat the appellee's right to recover the premiums and assessments paid by her. She did not take out the policy. She violated no statute. She knowingly did no act prohibited by law or by public policy. She has not attempted to enforce the illegal contract, or make any claim under it. She admits that she has no claim against the appellant upon the policy. While she must give up the insurance upon the life of Mrs. Ellsworth, because the contract was void, it is equally necessary that the appellant should surrender the money it has received from her without right, without consideration, and solely through the fraudulent misrepresentations of its officers. * * * *[1]

---

iii. *Principal and Agent.*

SMITH ET AL. v. BLACHLEY.

188 PA. ST. 550.—1898.

ASSUMPSIT to recover money had and received.

From a judgment for defendant, plaintiffs appeal.

DEAN, J.—Blachley, the defendant, a physician, practiced his profession in the years 1888 and 1889 in Morris township, Washington county. In the adjoining township lived Joseph Beabout, farmer, his wife, and daughter Alice, the latter a single woman; also, John McCullough, farmer, his wife and son. Blachley was at times called in as a physician to both families, where they lived in the country, about three miles apart, while the physician's office was about five miles from both. In February, 1887, Blachley was called in to attend Alice, the daughter of Beabout, in an illness which he said was the result of a criminal abortion. About February or March, 1888, after she was restored to health, he called upon McCullough, and soon after upon Beabout, and represented to them that the Humane Society of Pittsburgh was about to institute a criminal prosecution against the members of both families for procuring the abortion, and suggested to them that he was in conference with the agent of the society, and that the matter might through him be hushed up by their paying over to him the sum of $3,000, which he would give to the agent to stop further inquiries. Several interviews were subsequently had, in which the representations were repeated. He dwelt largely on the disgrace which such a prosecution

[1] Compare Fisher v. Ins. Co., 160 Mass. 386 (1894).

would bring on both families, and further offered to assist them in obtaining the money through a bank in the town of Washington. On the 15th of May following, Beabout and McCullough went to Washington, met Blachley, got the money from the bank, and paid it over to him. He told them the agent of the society had not yet arrived, but, when he came, he (Blachley) would pay the money to him, and take his receipt. Afterward he advised them frequently to keep quiet concerning the matter; to tell no one; not to employ counsel or advise with others, or trouble might result. Deterred by this advice and caution, they made no inquiries until a short time before this suit was brought, 16th of November, 1895. Then McCullough (Beabout having died in the meantime) discovered that no prosecution had been contemplated by the Humane Society, and, so far as could be discovered, it had neither knowledge of nor authority to institute such prosecution; further, that Blachley had pocketed the money, and still retained it; that the whole story narrated by him, from beginning to end, was a tissue of falsehoods, concocted to extort money from them. The plaintiff offered ample evidence tending to establish these facts. As the court below entered a compulsory nonsuit, we must consider them, for the purpose of review, as fully proven.

The defendant, in addition to non-assumpsit, pleaded the statute of limitations. The court below sustained the latter plea, saying: "Under the circumstances, their [the plaintiffs'] right of action against Blachley accrued, and the statute of limitations began to run as soon as the money was paid to him. They cannot be heard to say that he committed a fraud upon them by failing to consummate an arrangement which was in itself a fraud upon the administration of justice. The plaintiffs are the parties who, to maintain their action, are compelled to uncover and invoke the aid of the corrupt agreement. This being the case, they cannot profit by it, either directly, as the foundation of an action, or by using it to toll the statute." Is this conclusion warranted by the facts? It is the policy of the law to leave parties to an illegal transaction where it finds them, by refusing relief to either party. Assuming, what is not proved, that the crime of abortion was committed, and that those who participated in procuring it were the six members of the two families, and that the parties on the one side to the composition of the crime were the heads of the two families, Beabout and McCullough, where is the other party? Blachley was not the prosecutor, and did not pretend to be. According to his own statement, he was their physician, friend and adviser. He urged them to stifle the prosecution by paying money to the Humane Society, the pretended prosecutor, the other party to the composition. He was the mere agent of the Beabouts and McCulloughs. Assume, then, as plaintiffs allege and defendant admits, that he was their agent to carry the money to the society; and assume, further, that he was lying all the time to them; that, in fact, there was no such prosecutor; then the offense was impossible of commission, for want of parties. This leaves Blach-

ley in the position of a mere blackmailer, who has extorted money from his patients, from those who confided in him, and whose friend he pretended to be, by falsehoods which operated on their fears, and leaves them in the position of having given money to their agent and supposed friend to be used by him in compounding a crime, that they and their families might be saved from scandal. What is the policy of the law as to the relation thus assumed by Blachley, the agent, toward these plaintiffs, his principals? It is to exact from such agent the most unflinching fidelity to his principals. It abhors any unfair dealing, treachery, or overreaching. The same rule governs as between master and servant, client and counsel, physician and patient. The relation is one of trust and confidence. They do not deal at arm's length. The principal is in the power of the agent. He is helpless against wrong. May this confidant, by falsehood, entrap his principal into an illegal intent, get possession of his property or money, and then claim exemption from restitution by pleading that his principals intended an illegal act? We can conceive of nothing more destructive of morals in these relations than to hold such a rule applicable to the facts of the case before us. Such an application would be a license to agents and those occupying confidential relations to plunder their principals.

We have no authority in this state directly to the point one way or the other. Quite a number in other states and in England sustain the view we have taken. In Evans v. Trenton, 24 N. J. Law 764, Evans had been treasurer of the city. He sought to retain $500 of the city's money in addition to his salary, out of a fund realized from the issue of currency to raise funds for the city. The extra services were performed in this transaction, which was in violation of the banking laws of the state. When suit was brought against him, he set up the illegality of the transaction as a defense. The court held: "The mere agent to an illegal transaction cannot set up the illegality of the transaction in a suit by his principal to recover money that has been paid to such agent for his principal on account of the illegal transaction. This defense can only be set up by a party to the illegal transaction." In Baldwin v. Potter, 46 Vt. 402, Baldwin employed Potter to make sales of candy by a scheme which was violative of the law prohibiting lotteries. In suit by the principal against the agent for the money so received, the agent pleaded the illegality of the transaction by which he obtained the money. It was held that if the suit had been between the plaintiff and the purchaser of the candies, the parties to the illegal contract, it could not have been maintained; and then the court says: "But the defendant [the agent] insists that, 'inasmuch as the plaintiff could not have enforced the contract of sale as between himself and the purchaser, therefore, as the purchaser has performed the contract, by paying the money to the plaintiff through me as their agent, I can now set up the illegality of the contract of sale to defeat the action brought to enforce a contract on my part, to pay the money that I, as agent, received, over to my principal. In other words, be-

cause my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance.' We think the law is well settled otherwise." In Wood, Mast. & S., § 202, this is the text: "While the courts will not enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor, upon the ground of the illegality of the original transaction." There are numerous authorities to the same effect. If, then, the agent cannot successfully set up the unlawful contract to enable him to hold money received from another, for his principal, much less can he set up a pretended illegal transaction to retain money extorted from his principals by the grossest falsehood to further the mythical illegal transaction. The money still belongs to the principal, and he can rightfully demand it as soon as he discovers the fraudulent conduct of his agent.

It is argued that, even if no crime was actually committed by plaintiffs, yet there was an intent to commit one when they paid the money to Blachley, and hence, even if their agent defrauded them, they cannot recover it back. As we have noticed, the intended crime was an impossible one. When conduct susceptible of two constructions is proved, the intent often determines its criminality; but an intent not carried out by an act, or which is impossible of execution by an act, is not punishable. The law takes no cognizance of an intent existing only in the mind, nor does it impose, as a penalty for such intent, immunity to him who has plundered one guilty of it. "The illegal intention must be accompanied by an act which is criminal or prohibited by law, in order to make the transaction illegal." 1 Bish. Cr. Law 204 *et seq.*

As to the plea of the statute of limitations, it will not screen defendant from liability if the suits were brought within six years of the discovery of the fraud. There was ample evidence, if believed by the jury, that defendant had, by systematic falsehood and artifice, not only concealed the fraud, but for a long time had deterred his employers from inquiry. Under such circumstances, the plea will not avail him. The judgment is reversed, and a procedendo awarded.[1]

[1] Compare Portsmouth Brewing Co. v. Mudge, 68 N. H. 462 (1896).

In McMullen v. Hoffman, 174 U. S. 639 (1899), in an opinion containing an exhaustive review of the cases, the court says (p. 660): "Where A claims money from B, although due upon an illegal contract, and B acknowledges the obligation and waives the defense of illegality and pays the money to a third party upon his promise to pay it to A, the third party cannot successfully defend an action brought by A to recover the money by alleging that the original contract between A and B was illegal. This is the principle decided, and we think correctly decided, in the cases cited. It was certainly no business of the third party to inquire into the reasons which impelled the person to give him the money to pay to the plaintiff. That was a matter between those parties, and if the party from whom the money was due ad-

LINESS v. HESING.

44 ILL. 113.—1867.

Mr. Justice LAWRENCE.—Liness being desirous of procuring the office of clerk of the police court in the city of Chicago, sent to Hesing the following letter:

"A. C. Hesing, Esq., Chicago, April 7, 1865.
"Present— (Private.)

"DEAR SIR—Inclosed please find twenty dollars, for which please use your influence to get me nominated for police court clerk; if I get the nomination, call on me for twenty more.

"I am, sir, very truly yours,
"JOSEPH LINESS."

Hesing used his influence not for Liness but against him, whereupon the latter brings this action to recover the twenty dollars. The object of sending this money was to secure the nomination and election of the plaintiff to a public office of trust and responsibility without reference to his fitness for the position or the public good. It was an attempt to influence, by moneyed considerations, the action of the defendant, in a matter where every person should be governed solely by a regard for the public welfare. The principle is well-settled that courts will lend no sanction to transactions of this character, by recognizing them as the basis of legal obligations. *Ex turpi causa non oritur actio.* We must leave these parties as we find them.

Judgment affirmed.[1]

LEMON v. GROSSKOPF.

22 WIS. 447.—1868.

IN the winter of 1865-66, the firm of Briggs, Lemon & Co., of which plaintiff was a member, were the originators and owners of a

mitted his indebtedness and chose to pay it, the defendant, who received it upon his promise to pay the plaintiff, would have no possible defense to an action by the plaintiff to compel such payment. Such an action is in no sense founded upon an illegal contract. That matter was closed when the party owing the money under it paid it to a third person to be paid to the plaintiff."

In Morgan v. Groff, 4 Barb. (N. Y.) 524 (1848), plaintiff sent to defendant a check (afterward cashed by defendant) to be used by the latter in making a wager on an election with Thompson, for plaintiff. Defendant did not make the bet as directed and after election, plaintiff sued to recover the money. *Held,* he could do so: 1st, because, if the transaction "be regarded as a contract, it is very clear that it was never executed;" 2d, because, "if the defendant was merely the agent of the plaintiff in making the contemplated bet with Thompson—and this is all the proof makes out—the defendant cannot excuse himself from paying over the money because it was sent to him for an illegal purpose." This case overruled the case of Morgan v. Groff, 5 Denio 364 (1848).

[1] Compare Walker v. Chapman, stated in White v. Franklin Bank, reported herein ante, pp. 225, 229.

lottery scheme in the city of Chicago, Illinois, known and described as a gift concert, the tickets of which were sold at one dollar each. During that winter, they placed in the defendant's hands a number of the tickets to be sold by him as their agent; and there was an understanding between them that he should retain the money received for such tickets until satisfied that the drawing of the prizes in said scheme was to be fairly conducted. During the same winter, said firm left with one Kilgore, in the city of Milwaukee, a number of said tickets to be sold by him as their agent, the money received by him to be paid over to them before the drawing of the prizes. Defendant, as agent of said firm, sold 258 tickets and received $258 therefor; and he himself retained nineteen of the tickets as a purchaser. Before the drawing of the prizes (which took place March 28, 1866), plaintiff became sole owner of said gift concert scheme. Before said drawing, Kilgore was directed by defendant to deliver to him all moneys which he (Kilgore) had received as agent for the sale of said tickets, to be transmitted to the plaintiff; and accordingly he did deliver to defendant $255 received by him for tickets; $95 of which were so delivered without any conditions or instructions, other than a statement that it was money for the plaintiff, derived from the sale of tickets in said scheme in this state; but when the balance of the $255 was delivered to defendant, Kilgore directed him to retain the same until satisfied that "the show was all right," though Kilgore had no authority from plaintiff to attach any conditions to the transmission of said money by defendant. Defendant went to Chicago about the time the drawing was to take place; and, before the drawing, becoming satisfied that it was to take place fairly, according to the advertisement, he accounted with plaintiff for all the money he had received for tickets sold by himself, and for nineteen tickets which he retained as sold to himself, and for said sum of $255 received from Kilgore, and gave plaintiff his check on a bank in Milwaukee for the whole amount, which was intended as a payment; but said check was not paid. Afterward defendant gave plaintiff his note at thirty days for the amount of said check, with interest, and took up the check. The present action is upon the note.

The county court held that the plaintiff could not recover; and from a judgment against him, plaintiff appealed.

COLE, J.—The counsel on both sides substantially concede that the rule is well settled, that courts will not enforce illegal contracts; but they differ as to the application of that rule to the facts of this case. So far as the nineteen tickets, which the defendant retained for himself, are concerned, it is admitted by the plaintiff's counsel that no recovery can be had. Then the question arises, was the plaintiff entitled to recover the money received by the defendant for tickets sold by himself? It is insisted that he can recover that money because the illegal contract has been fully executed; the purchasers of the tickets having paid over the same to the defendant for the use of the plaintiff. It is said that when money is paid by one person, on an illegal contract, to the agent of the party entitled to re-

ceive it, such agent cannot set up the illegality as an answer to the claim of the principal; that, as between the agent and the principal, the action is not founded on the illegal contract, nor does the obligation of the agent to pay over the money grow out of such contract, but arises from the fact that the agent has received money for the principal. This may be true in some cases, and seems to be the ground upon which Tenant v. Elliott, 2 B. & P. 4; Farmer v. Russell, id. 296; Sharp v. Taylor, 2 Phillips (22 Eng. Ch. R.) 801; Owen v. Davis, 1 Bailey 315, and some other cases to which we were referred on the argument, are decided. It seems to us, however, that the doctrine of these cases is not entirely applicable to the case before us. The difference may not be very discernible, but still we are disposed to give it weight in our decision. Here the defendant was employed by the plaintiff to sell these lottery tickets, receive and retain the money for them until he became satisfied that the drawing of the prizes in the scheme was fairly conducted, and then account to the plaintiff. It was as well a part of his agency to receive and account for the money, as to sell the tickets. And an action to recover this money goes in affirmance of the illegal contract, and to enforce the performance of this duty. The main object of the agency was to do an act criminal by our statute (section 2, ch. 169, R. S.)—to engage "in a traffic not merely forbidden, but fraudulent and indictable." And if the agent is dishonest in the transaction of the business—if he refuses to account for money which he has secured for the tickets sold by him—should the court interfere and enforce a performance of his duty? It seems to us that the court must decline to interfere on either side, upon the maxim, *ex turpi causa non oritur actio.* In Hunt v. Knickerbocker, 5 Johns. 326, which was an action on a contract made for the sale of tickets in a lottery not authorized by the legislature of New York, Mr. Justice THOMPSON, in delivering the opinion of the court, said: "No case could be found where an action has been sustained, which goes in affirmance of an illegal contract, and where the object of it is to enforce the performance of an engagement prohibited by law. Wherever an action has been sustained against a party, to prevent him from retaining the benefit derived from an unlawful act, the action proceeds in disaffirmance of the contract; and, instead of endeavoring to enforce it, presumes it void." See Thalimer v. Brinkerhoff, 20 Johns. 386-397; Armstrong v. Toler, 11 Wheaton 258. It seems to us that the obligation of the defendant to pay over the money which he has received for the tickets sold by him, is so connected with the illegal contract as to be inseparable from it, and that a court should not lend its aid to enforce it. Murdock v. Kilbourn, 6 Wis. 468.

But the money which the defendant received from Kilgore stands upon different grounds. So far as that money was concerned, it seems to us that it stands precisely on the same ground it would, had Kilgore delivered the money to some stranger, or to an express company, to transmit it to the plaintiff. It is disconnected with the

illegal transaction, and is not affected by it. It is the case suggested by the master of the rolls in Thompson v. Thompson, 7 Ves. Jr. 468-471, of money paid into the hands of a third person for the use of the plaintiff, who may recover the same from such third person, although the money is the proceeds of some illegal transaction. Merritt v. Millard, 5 Bosworth 645. Therefore, so far as respects the two hundred and fifty-five dollars paid the defendant by Kilgore for the plaintiff, the action is maintainable.

The judgment of the county court must be reversed, and the cause remanded with directions to enter judgment for the plaintiff for that amount.

By the court. Ordered accordingly.

SMITH v. RICHMOND.[1]

114 KY. 303—1902.

ON demurrer. Demurrer sustained.

GUFFY, C. J.—* * * * We copy the opinion of the court below, as one of the means of making a clear statement of the contentions of the parties hereto: "The cause is submitted on demurrer to petition as amended. There are some depositions taken on behalf of plaintiff in the record, but they are not read or considered on this motion. There is no ascertainment of the facts, and the allegations of the petition as amended are taken as true only for the purpose of this demurrer. The facts so taken as true are as follows: In the year 1890, or prior thereto, the plaintiff, Smith, was engaged in the business of conducting a lottery in the city of Cincinnati, Ohio. S. T. Dickinson & Co. were at the same time engaged in the same business in the same city. M. J. Richmond, defendant hereto, was the employe and agent of said Dickinson & Co. One Louis Davis was also conducting the same business at same time and place. The plaintiff, Smith, and said Davis and said Richmond, representing said Dickinson & Co., held a meeting, at which it was agreed that the several parties engaged in said business should each month pay to said Richmond a certain sum of money, to be applied by said Richmond in bribing and corrupting the authorities of the state of Ohio and of the city of Cincinnati, to thereby procure immunity for those engaged in said business. The said Smith, pursuant to said agreement, paid to said Richmond from May, 1890, to May, 1897, the sum of $16,075, but the said Richmond, instead of using said money in the bribery of Ohio officials (assuming, for the purposes of this demurrer, that such a thing were possible), retained the money and converted it to his own use. This action is instituted by

Smith to recover of Richmond said sum of $16,075, and, on demurrer to the petition as amended, the question arises as to whether the law and the courts will furnish relief to one occupying the position held by the plaintiff, Smith. This action is in equity. It is contended by the defendant on this demurrer that where the consideration of a contract is an agreement to hinder, impede, or defeat the administration of the criminal or penal laws, the contract is against public policy, is void, and that no party thereto can enforce it by process of law. The plaintiff, on this demurrer, admits the existence of this principle contended for by defendant, but says it applies only as between the parties to such a contract, and does not apply as between one of the parties and his agent, or the agent of all the parties, acting as go-between in carrying out the vicious provisions of the contract. The plaintiff quotes and relies upon the opinion of the Kentucky court of appeals in case of Martin v. Richardson, 94 Ky. 183, 21 S. W. 1039, 19 L. R. A. 692, 42 Am. St. Rep. 353. Martin was the agent of a lottery company. He sold to Richardson some tickets in his lottery, one of which drew a prize; and, while Richardson was ignorant of this fact, Martin induced him to exchange the tickets he held for other tickets, and Martin collected the prize from the lottery company. Richardson sued Martin for the money, and the court of appeals held that he could recover; that, even assuming the purchase and sale of the lottery tickets to have been an illegal transaction, Richardson could not avail himself of that fact as a defense. It seems to me that it would have been strange had the court of appeals held otherwise. The purchase and sale of the lottery tickets constituted a transaction that was, at most, illegal. The act of Martin in procuring an exchange of the tickets was a crime. The court of appeals simply refused to permit the commission of an act, at most illegal, by one, 'to be pleaded as a defense to the commission of a crime by another.' It refused to permit the commission of a lesser wrong by one to be used as a defense to the commission of a greater crime by another. This opinion in that case is not applicable to the case at bar. The plaintiff quotes and relies upon Wharton on Agency, and the opinions of several state courts, from which it may be assumed to be the rule that an agent who has in his hands money belonging to his principal, on a closed account, cannot set up as a defense, in an action by the principal for money had and received, the illegality of whole or a part of the transaction. In all the extracts from these authorities quoted in brief for plaintiff, the word 'illegal' is used in speaking of the contract. Plaintiff's counsel has not provided this court with the facts of any of the cases he has referred to. The only reference made in any of the extracts set out in plaintiff's brief is to 'illegal' contracts. It appears certain that if Smith had furnished this money to Richmond as his agent for the purpose of conducting a lottery, and that Richmond retained and converted the money, Smith could recover of him, even in a state where the conducting of a lottery was unlawful. But in the case at bar the plaintiff was for seven years continuously

engaged not only in conducting an unlawful business, but in attempting, and, as he believes, successfully attempting, to bribe and corrupt the authorities of Ohio and Cincinnati, and to that end he delivered to Richmond over $16,000. For the seven years this plaintiff was engaged in the commission of an act that this court may fairly assume to be a crime in the state of Ohio, the place of its commission. Counsel for plaintiff has not furnished this court a single instance in which any court has given relief to one in such a position, as against a defaulting agent. I believe there is a broad distinction between contracts illegal and contracts criminal, even when considered in reference only to the relations and respective rights of one of the parties thereto and his agent. This plaintiff is asking the law and the courts of Kentucky to aid him in recovering back money that he paid out for seven years, believing it was being used in the bribery of the authorities of a sister state. This does not seem to be the purpose for which the courts of this state are created or are existing. It is but rarely that such an unblushing confession is seen as in the plaintiff's pleadings in this case. It may be observed that Richmond, in putting this money in his pocket, and keeping it there, although in so doing he defaulted, was guilty of an offense much less than that he would have been guilty of had he carried out the purposes of his principal. In this connection the fact is emphasized that as to Richmond there is no evidence that these things are true, and that they are assumed to be true solely for the purpose of this demurrer. It appears by his own pleading that the hands of Smith are so unclean that he is not entitled to ask any relief in any court, and the demurrer to the petition as amended is sustained. The plaintiff declines to plead further. The petition herein is dismissed, and it is adjudged that the defendant recover of the plaintiff his costs herein, to which plaintiff excepts, and prays an appeal to the court of appeals, which is granted."

It is evident from the pleadings of the appellant that he, the appellee Richmond, and Davis were engaged in operating lotteries in the city of Cincinnati, which was a violation of the criminal laws of the state; that in order to procure immunity from arrest and punishment, or, in other words, to corrupt the officers and to defeat justice, they made the agreement set out in the petition, and Richmond was to receive and pay over the money to procure the desired immunity from arrest and prosecution; and that the business was so conducted for about seven years, during which time the sum aggregating $16,075 was paid over to Richmond. It may be inferred from the petition that the desired protection was secured, as it is nowhere claimed that the object of the agreement was defeated. Appellant refers to a number of decisions of this and other courts in his two able briefs, which he claims sustain his contention in this case. Upon examination of the various cases, it will be found that they cover what may be called three classes of cases: One is where a party simply employs a man as agent to go and pay money to a third party for an illegal purpose. Another class is where parties may be

engaged in an illegal business, and have realized considerable pecuniary profit, in the shape of money or other property, which is in possession of the other party to the crime, in which case some courts hold that such party has in his hands money or property which justly belongs to the other parties, and, although it is the fruit of illegal business, yet he will not be allowed to have the same simply because the business which procured the property is illegal. The other class is where employes who are simply the servants employed to carry on and conduct an illegal business will not be permitted to withhold from the owner property which was placed in their hands by him for the purpose of conducting or carrying on such illegal business. The case at bar does not fall within the rule announced in any of the cases referred to. In this case these parties clearly entered into a conspiracy or partnership for the purpose of enabling them to violate the laws of the state of Ohio, and to corrupt or bribe the officers of the law. These parties were in reality partners in the venture or undertaking specified, and in the general course of business, be it legal or illegal, one of the partners only would handle the money or pay out at a time. In other words, all the parties would not be expected to go together and pay out or receive money together, but the act of one is the act of all. We conclude, therefore, that the transaction set up in the petition must be treated as the formation of a partnership for an illegal purpose, greatly to be condemned from any standpoint. A corruption of the authorities of a great state or city should not be tolerated. The payment of money to defeat the enforcement of the criminal laws is one of the most heinous of crimes, and no court should afford any relief to the parties engaged in such a nefarious business. The operation of lotteries is by common consent regarded as contrary to public policy, and highly immoral, and this plaintiff has added to that unholy business a still greater crime of bribing public officers, and paying money to prevent the enforcement of the criminal laws of a sister state. Both parties, according to the petition, are guilty of a great crime, and the court should not hear the complaints of either in respect to the illegal business conducted by them. To allow such would, in effect, be to wink at, if not to sanction, the most corrupt of practices. We think the opinion of the court below is in accord with nearly all, if not quite all, the authorities respecting such transactions, and in accord with the principles announced in the recent case of Safe Deposit Co. v. Respass, (Ky.) 66 S. W. 421, 56 L. R. A. 479. To allow the appellant to recover in this case would, in effect, be saying to all parties that "you can go on with reasonable safety, furnish money to a person for illegal and criminal purposes, and, after you have derived the benefit therefrom, sue the so-called agent and recover back the money, unless he, perchance, was able to prove to the satisfaction of the court that he in like manner had paid over the money for the said unlawful purposes." As before stated, we do not think that Richmond was the agent of plaintiff, in the legal sense of agency, but was simply one of the partners

in crime; and we know of no court that has ever sustained a suit of one partner for an accounting for money invested in an unlawful purpose, especially if such purpose was to violate the criminal laws of a state, and shield offenders from punishment, or corrupt public officers.

Judgment affirmed.

GOODRICH v. HOUGHTON ET AL.

134 N. Y. 115.—1892.

LANDON, J.—The plaintiff seeks to recover money alleged to have been received by the defendant Byron D. Houghton to her use, and appropriated by both defendants. The plaintiff and Byron D. Houghton, at Oswego, N. Y., agreed that each should contribute $25, and with the total purchase tickets in the Louisiana State Lottery at New Orleans, and that each should have one-half the prize money drawn. The plaintiff thereupon delivered $25 to said defendant, who, adding $25 of his own, sent the $50 by express from Oswego to the State Lottery at New Orleans, with an order in his own name for the tickets. The lottery company sent him the tickets by express to Oswego. These tickets subsequently drew prizes to the amount of $25,020, which sum was forwarded by the lottery company by express to said defendant at Oswego. He received it there, and paid one-fourth thereof to the plaintiff, refused to pay any more, and he and the other defendant appropriated the three-fourths. The plaintiff by this action seeks to recover an additional one-fourth. The difficulty with the plaintiff's case, as clearly shown by the opinion of the general term (9 N. Y. Supp. 214), is that she cannot prove that the defendants ought to pay her any part of the prize money except by proof of the contract; and as it was a gambling contract, still executory as respects the division of the prize money, the law will not enforce its execution, but will leave the parties where it finds them. Nellis v. Clark, 20 Wend. 24; Haynes v. Rudd, 83 N. Y. 253; Woodworth v. Bennett, 43 N. Y. 273; Knowlton v. Spring Co., 57 N. Y. 528. Any agreement made in this state to gamble in the legalized lotteries of another state is void in this state. Pen. Code, §§ 324-334; 3 Rev. St. (8th Ed.), p. 2220, §§ 24, 25, 32, 35, 38, 39; 1 Rev. St., p. 665; People v. Noelke, 94 N. Y. 137.

The learned counsel for the appellant does not contest these legal propositions, but contests the assumption of fact that the plaintiff's case requires her to trace her right to recover through a violation of our law. He contends that lotteries are lawful in Louisiana, and hence the buying of tickets and drawing of prize money are lawful there, and that, as the money was lawfully acquired in that state, it was lawfully transmitted to the defendant in this state, and the division of it here would violate no law, and therefore defendants'

agreement to divide it was not unlawful. This contention, if sound, manifestly impairs that purpose of our law, which seeks to protect the people of this state from participation in the vice and evils of lotteries. But assuming that every part of the transaction which took place in Louisiana was perfectly valid, and that the laws of this state can in no respect invalidate what was there completed, it is undeniable that the division of the prize money was not made there, but by the contract of the parties was to be made here. The contract for division was part of the entire contract, was made here, and was to be performed here. Its validity must be determined by our law. We undo nothing that has been done in Louisiana, but we refuse to complete in this state any part of the transaction which remains unfinished. The plaintiff cannot recover without resort to the unexecuted part of the contract.

The learned counsel for the plaintiff further urges that, after the prize had been drawn, the parties agreed that it should be forwarded by express to the defendant at Oswego, and that he should, upon receiving it, bring it to the plaintiff's house in that city, and there divide it equally; and that that agreement does not involve the original agreement, but merely respects the receipt and division of money which they could command in New Orleans. The defendant did send for and receive the money through the express company. But he did not receive the plaintiff's share as a depositary for her use or in order to deliver it to her. No such question is presented. The defendant had bought the tickets in his own name, and hence received the money as if wholly due to himself. The consignor of the money imposed no duty upon him to deliver any of it to plaintiff. Grant that the defendant violated his agreement with the plaintiff in taking the title to the tickets in his own name, the court, for reasons already stated, could not aid the plaintiff in that respect. The defendant could, therefore, after the prize was awarded, secure possession of the money without the assistance of the plaintiff. When, therefore, he agreed to send for the money by express, and divide it with the plaintiff when obtained, he did so upon no new consideration, but because of the original agreement to buy the tickets and divide the prize. The original agreement thus cannot be kept out of sight, and, as it will not support a new promise, the plaintiff is still remediless. Concurring, as we do, in the opinion of the learned general term, further discussion is unnecessary. Judgment affirmed with costs. All concur.

SUMMARY.—The following summary is given in an anonymous note to Jaques v. Withey, 1 H. Bl. 65 (4th Ed. 1827): "The late decisions with regard to the cases in which a party is entitled to recover money *paid by himself* in pursuance of an *illegal contract*, may be classed under the following heads: 1. He *is* entitled to recover it while the contract remains *executory*, even though he is *in pari delicto* with the defendant; Tappendal v. Randall, 2 Bos. & Pul.

467. Aubert v. Walsh, 3 Taunt. 277. Busk v. Walsh, 4 Taunt. 290. S. P. per BULLER, J., Lowry v. Bourdieu, Dougl. 468. A distinction however has been taken between contracts merely illegal and contracts to perform some act *malum in se,* or grossly immoral, in which latter case it is said the courts will not interfere to compel the repayment of the money though the contract remains executory (per HEATH), Tappendal v. Randall, 2 Bos. & Pul. 471; but the distinction between *mala prohibita* and *mala in se,* has been frequently denied. See Farmer v. Russell, 1 B. & P. 298. Aubert v. Maze, 2 B. & P. 371. Cannan v. Bryce, 3 B. & A. 179.—II. He *is* entitled to recover it from a *stakeholder,* into whose hands it has been paid upon an illegal contract, which has been *executed* by the happening of the event upon which the wager is made, unless the money has been paid over by the stakeholder to the other party before demand; Cotton v. Thurland, 5 T. R. 405; Bate v. Cartwright, 7 Price 540; Smith v. Bickmore, 4 Taunt. 474, and see 1 R. & M. N. P. C. 214 (note).—III. He *is* entitled to recover it though the contract is *executed,* provided he is not *in pari delicto* with the defendant; Jaques v. Withy, *supra.* Williams v. Hedley, 8 East 378.—IV. He is *not* entitled to recover it where the contract is *executed,* and he is *in pari delicto* with the defendant. Andree v. Fletcher, 3 T. R. 266; Howson v. Hancock, 8 T. R. 575; Vandyck v. Hewett, 1 East 96; Morck v. Abel, 3 Bos. & Pul. 35; Thistlewood v. Cracroft, 1 M. & S. 500; Stokes v. Twitchin, 8 Taunt. 492.—The agent of the party to an illegal contract, who receives money under it to the use of his principal, cannot set up the illegality of the transaction in an action brought against him by his principal. Tenant v. Elliott, 1 B. & P. 3; Farmer v. Russell, ibid 296; but see M'Gregor v. Lowe, 1 R. & M. N. P. C. 57.—As to the recovery in equity of money paid under an illegal contract, see Morris v. M'Cullock, Amb. 432, 2 Eden. 190, s. c. Whittingham v. Burgoyne, 3 Anstr. 900."

C. RECOVERY FOR BENEFITS NOT CONFERRED VOLUNTARILY.

1. MISTAKE.

a. MISTAKE OF FACT.

i. *In General.*

BALTIMORE AND SUSQUEHANNA R. R. v. FAUNCE AND PASSMORE.

6 GILL (MD.) 68.—1847.

CHAMBERS, J.—Two questions arise on this record: First, whether the plaintiffs can recover back money paid under such circumstances of knowledge or means of information as existed in this

case? And secondly, if entitled in other respects, whether the plaintiff is precluded by reason of the character of the notes in which the payment was in part made?

The facts upon which the opinion of the court was asked are, that the payment was made in the mistaken belief that the sum paid was the true balance appearing due by the final estimate, and that the agent who made the payment for the plaintiffs intending to pay that balance, and not noticing the deduction of $870, paid a sum larger by that amount than he intended. It is rightly said, that a party cannot recover money voluntarily paid with a full knowledge of all the facts, although no obligation to make such payment existed. If informed of the law which exempts him, he must abide the consequences of his folly, in abandoning the protection it afforded him—if ignorant, he was bound to acquire information. It is regarded as a gift without consideration. But full knowledge of the facts is here negatived. The statement in the bill of exception assumes, and the testimony of the witness shows, that he made the payment, believing at the moment of making it, that the engineer, whose estimates he was bound to regard, had certified the sum to be due which was actually paid.

Then it is urged that ample means were at hand to obtain full and accurate information, and many cases have been referred to as establishing the proposition, that a recovery cannot be had where the party paying has access to information, and by his own laches neglects to acquire it. Certainly some of the authorities seem to countenance such a doctrine; but, we think, the opposite opinion best accords with the plainest principles of justice, and has the weight of authority to sustain it. The case of Lucas and others, and Worwick, 1 Mod. & Rob. 293, in many particulars, resembles this case. The defendant had a claim against the plaintiffs for work and labor, amounting, as defendant alleged, to £142; the plaintiffs disputed certain items, and admitted a balance of only £97; at defendant's request Lucas, one of the plaintiffs, paid £20 on account. The defendant afterwards met Lucas and agreed to abandon the disputed items. Whereupon Lucas paid him £97, forgetting the previous payment of £20; but, almost immediately after, notified the defendant of the mistake and demanded the return of the £20; and on his refusal, the action was brought to recover that sum. The case was fully discussed before Denman and Baron Bolland, who held that as the money was paid by mistake in the hurry of business, it might be recovered back as received to the use of the plaintiffs. The case of Kelly v. Solari, 9 M. & W. 54, was fully considered. There the parties paying had at one time a knowledge of the fact, the forgetfulness of which subsequently induced them to make the payment. The Chief Baron, at *nisi prius*, instructed the jury that the previous knowledge or means of knowledge would prevent the recovery; but on argument, he united with all the other Barons in the opinion, that there must be knowledge existing in the mind at the time of the payment. Of what avail is

it, in any view of justice or sound sense, that a man once knew or had means to know a fact, if, at the moment when alone, such knowledge is practically useful, he is actually ignorant of it?

A payment cannot well be said to be made voluntarily when it is made in consequence alone of a false view of facts. The assent is only induced by the conviction then prevailing in the mind, that the particular fact existed, and is scarcely to be distinguished from an assent or agreement to pay on the condition that the fact did exist. The subsequent discovery of the error destroys the whole basis of the agreement, and the parties are restored to their original condition and rights. Of what avail is it that industry and vigilance might have procured the information? Still, the party has done an act he did not intend to do, and did not know or believe he was doing. In this case, the agent assented and agreed to pay only what the engineer certified; he supposed he was paying no more when he delivered the notes to defendants, and his volition was no more involved in any amount beyond than it would have been had he paid them a bank note of $1,000, misreading, and intending it to be a note of $100. In the case of Bell v. Gardner, 4 Man. & Gran. 11, found in 43 Eng. Com. Law 16, the judges of the common pleas unanimously adopt the principle of Lucas & Worwick, and applying it to the case before them held it to be a good defense to a suit on a promissory note, that it had been given to the plaintiff to discharge a debt supposed to be due; but which, owing to a fact then unknown to defendant, was not legally recoverable, although the defendant had ample means of knowing the fact.

We are therefore of opinion, that there was nothing in the facts of this case as stated in the exception, which would prevent the plaintiffs from recovering, because of the alleged voluntary character of the payment with the means of knowing and correcting the error under which it was made. We will now consider whether the recovery is barred by reason that the payment was made in the particular notes which the defendants received. * * * *

TINSLAR v. MAY.

8 Wend. (N. Y.) 561.—1832.

Assumpsit. The declaration contained the common money counts. The plaintiff proved that in the settlement of a bond and mortgage which he held against the defendant, the defendant was credited by *mistake* with $136.32, the interest of the principal sum due the plaintiff for the year ending on the 1st of April, 1825; that the settlement took place on the 2d of April, 1830, when the sum of $1,448.61 was paid to the plaintiff, and the bond and mortgage assigned by the plaintiff to a brother of the defendant, at the re-

quest of the defendant. The plaintiff claimed to recover the above sum credited by mistake. The defendant objected that the plaintiff could not recover *as for money had and received;* that he should have declared either specially or upon the original consideration, and if the bond and mortgage were cancelled, he should have resorted to a court of equity; which objection was overruled, and the plaintiff had a verdict for the amount of the sum credited by mistake, with the interest thereof. The defendant moved for a new trial.

SUTHERLAND, J.—I think the motion for a new trial should be denied. The action for money had and received will lie. The mistake was equivalent to so much money to the defendant; he had a credit to that amount, to which he was not entitled.[1] The jury have found the fact of mistake, and there can be no doubt that *ex aequo et bono* the defendant ought to refund to the plaintiff.

New trial denied.[2]

[1] See also Queensborough Gas Co. v. Schoncke, 76 Misc. (N. Y.) 190 (1912).

[2] If a debtor transfers property at an agreed valuation, in discharge of a debt mistakenly supposed to exist, the amount of recovery is the reasonable value of the property and not the agreed valuation. Johnson v. Saum, 137 Iowa 198 (1908).

BUFFALO v. O'MALLEY.

61 Wis. 255.—1884.

Action to recover the sum of $40, which was claimed to have been overpaid by the plaintiff to the defendant upon a contract for the transportation of tan-bark. The complaint alleged that such overpayment was made under a mistake of fact as to the quantity of the bark, arising from ignorance on the part of the plaintiff as to the manner of piling and measuring tan-bark for shipment.

Cole, C. J.—In whatever light this case is considered, we think the motion for a non-suit should have been granted. There is no proof of fraud in the transaction, and as little of any mistake of fact for which the plaintiff is entitled to relief. The defendant was to be paid at the rate of two dollars per cord for carrying the bark in question from the place of shipment to Duluth. There is no dispute but that this was the agreement. Now, the contention of plaintiff is, that under a mistake as to the quantity, he paid the defendant for transporting sixty cords, when there was only forty cords according to the Duluth measurement. But there is not a *scintilla* of proof that the quantity of bark was to be ascertained or determined according to the manner of piling and measuring tan-bark at Duluth. It does not appear that either party so understood the contract as to the carriage. The plaintiff admitted that he measured the bark himself, when it was piled on the bank, and that there were sixty-three cords. When he paid for it he thought it would probably not fall short more than three cords. He supposed a cord of bark was a pile eight feet long, four feet high and four feet wide, as it is. So, on the bank where the bark was piled, it actually measured sixty-three cords, to the knowledge of the plaintiff. But the plaintiff seems to have been ignorant of the fact that where bark was curled badly, as his bark was, it was customary to make allowance for it in the measurement when sold; or to pile the bark tight by tramping it down and filling up the holes. And this was what caused the shrinkage in the bark when it was piled at Duluth for sale.

But, as we have said, there is not a particle of evidence that the defendant agreed to transport the bark for two dollars per cord according to Duluth measurement. No such contract was made. Upon what ground, then, can the plaintiff claim the right to recover back part of the money which he paid the defendant for transportation? There was sixty cords or more according to the bank measurement, and the plaintiff admits that he was to pay at the rate of two dollars per cord for carrying it to Duluth. Suppose a part of the bark had been rejected by buyers in Duluth because not merchantable, could it be claimed the defendant must lose his transportation of the unsalable bark? There would be quite as much reason in claiming that the defendant should stand the loss in the case supposed, as there is in saying, upon the testimony in the record, he should be paid for only forty cords because there was a shrinkage of twenty cords when it was piled as required in the Duluth market. In truth, the evidence shows that there was no mistake as to the bank measurement, and we must assume, in the absence of all proof to the contrary, that the parties contracted with reference to that measurement. It follows from this that there was no overpayment.

Now, to entitle the plaintiff to recover, he was bound to prove, either that there was a mistake in the bank measurment, that there was not sixty cords as there piled, or that the defendant agreed to carry the bark for two dollars per cord according to the Duluth measurement. Neither case was established by the evidence. It is needless to observe, courts do not relieve against every mistake a party may make in his business transactions. A mistake in a matter of fact, to be the ground of relief, must be of a material nature, inducing or influencing the agreement, or in some matter to which the contract is to be applied. It is obvious that the mistake which the plaintiff made was in supposing that curled bark, piled in the loose manner his bark was piled, would hold out in measure when piled as dealers required. But this was a mistake as to a collateral fact, which had nothing to do with the contract of carriage. It is said the plaintiff paid for the carriage upon the belief that there was sixty cords of it, and that this belief was founded upon his having measured the bark on the bank. He certainly was not mistaken as to the quantity of the bark on the bank, but was mistaken in supposing that a dealer would take it at Duluth piled in the manner he had piled it.

It is said that a cord of bark, *ex vi termini,* implies a cord, or 128 cubic feet; but the parties evidently did not use the word in such a sense when they were talking about the quantity on the settlement for the transportation at Duluth. They referred to the measurement on the bank—the number of cords as the bark was there piled; and the proof is entirely conclusive that payment was made with reference to that measurement. It is certainly true that the bark was not there piled in as solid and compact a manner as the Duluth dealers required it to be; but what of that? There was no mistake of fact

as to the bank measurement when payment was made, and no ground for relief shown.

It follows from these views that the non-suit should have been granted.

HARRIS AND ANOTHER, ASSIGNEES OF CARTER v. LOYD.

5 MEES. & W. (EXCH.) 432.—1839.

ASSUMPSIT for money had and received. Plea, *non-assumpsit*. At the trial before Lord DENMAN, C. J., at the last Warwick Assizes, the plaintiffs, who sued as assignees of Carter under a trust-deed for the benefit of creditors, sought to recover from the defendant, the sheriff of the county of Warwick, the sum of £57, being the amount of an execution levied on the goods of Carter. It appeared that the assignment to the plaintiffs was executed on the 5th of June, 1838. On the same day, but before the execution of the assignment, a writ of *fi. fa.* against the goods of Carter was delivered to the sheriff's agent in London, and a warrant granted thereon, under which the officer took possession on the 6th. The plaintiffs, in order to release the goods, paid the officer the amount of the levy, under protest, and he thereupon withdrew from possession. It subsequently turned out that Carter had committed an act of bankruptcy on the 2d of June, on which a fiat issued on the 18th, and the plaintiffs thereupon brought this action to recover back the money so paid to the sheriff's officer, as having been paid under a mistake of fact, they not having at the time had any knowledge of the act of bankruptcy. The Lord Chief Justice was of opinion that this was not such a mistake of fact as entitled the plaintiffs to recover back the money, and accordingly directed a non-suit, but gave leave to the plaintiffs to move to enter a verdict for £57. In Easter term, BALGUY obtained a rule *nisi* accordingly.

Lord ABINGER, C. B.—I am of opinion that this rule ought to be discharged. The plaintiffs appear to have been mere volunteers. Suppose the friends of the debtor had paid the money, and the possession of the goods had been thereupon delivered back to him; could they have recovered it back, upon its afterwards turning out that he had previously committed an act of bankruptcy? The plaintiffs claim under a deed of assignment, and pay the money, supposing that under it they have a right to the goods; in that they are mistaken. But the goods were liable to seizure; the property in them was not indeed divested by the writ, and the trustees might take them, but only subject to the right of the execution creditor. Then it is said the delivery of the writ was not to the sheriff, but only to his agent in London; I think that makes no difference whatever. The short answer, however, to the action is, that the money

was not paid under a mistake of fact, but upon a speculation, the failure of which cannot entitle the plaintiffs to recover it back.

ALDERSON, B.—This is money paid, not under a mistake, but under *a bargain*. True, it turns out to be a bad bargain; but that will not affect its validity. But further, the money is paid to the sheriff for the purpose of being paid over to the execution creditor, subject only to the plaintiffs' supposed right under the deed. By the delivery of the writ to the sheriff the goods are bound, and the property in them cannot afterward be transferred by the debtor, except subject to the interest of the execution creditor. There can be no doubt that the delivery to the deputy in London is a delivery to the sheriff; the deputy is appointed for that very purpose. The plaintiffs were wrong, and the sheriff right, at the time of the payment, and it was the duty of the sheriff to pay over the money to the execution creditor. Can it be argued, that after such payment over, he can be compelled to refund it? I think not. I am of opinion, therefore, that the rule ought to be discharged.

GURNEY, B., and MAULE, B., concurred.

Rule discharged.

EDWARDS ET AL. v. HARDWOOD MANUF'G CO.

59 MINN. 178.—1894.

GILFILLAN, C. J.—The action is to recover the price of nineteen carloads of barrel staves sold and delivered by plaintiffs to defendant free on board cars. The answer denies the sale of more than fifteen carloads, and sets up as counterclaims: First, an overpayment by mistake when paying for the fifteen carloads; and, second, that plaintiffs shipped to it four carloads which it had not ordered, and that it paid the freight and other charges, notifying plaintiffs that it would try to dispose of the four carloads for them, if desired. The communications between the parties were entirely by letters and telegrams. In respect to the number of carloads defendant ordered sent to it, the letters and telegrams are not so definite and precise as might be expected in business transactions. This, we think, was occasioned to some extent by delay of plaintiffs in making shipments of the carloads ordered. We suspect plaintiffs mistook for new orders what was intended as urging them to hurry the shipment of carloads already ordered, or as directing the destination of those already ordered. The court below was right in finding as a fact that only fifteen carloads were ordered by defendant, and it was also right in finding as a fact that defendant, through an error in calculating, made an overpayment on the fifteen carloads.

In respect to paying the freight and other charges on the four carloads, the defendant stands in the position of a volunteer. It could recover from plaintiffs the sums so paid only if paid at their

request, express or implied, or if they subsequently ratified the payment as made in their behalf. There is no finding of any such request or ratification, or of any facts that would amount to such, nor would the evidence sustain any such finding. The facts are: The plaintiffs, claiming the four carloads had been ordered, when in truth they had not been, forwarded them to defendant, who, on their arrival, protesting that it had not ordered them, received them, paying the charges, and gave notice to plaintiffs that it would hold them subject to their order. The plaintiffs never consented that it should receive and hold the carloads for them, nor in any other way than as its own property. The case is different from a sale by sample or description, the goods to be forwarded to the purchaser, in which case there is implied authority to the purchaser to receive the goods so far as necessary for proper inspection, and to pay whatever transportation charges he may be required to pay in order to such receipt and inspection. The court below will modify its direction for judgment by striking out the amount allowed for freight and other charges on the four carloads.[1]

SMITH v. GLENS FALLS INSURANCE CO.

62 N. Y. 85.—1875.

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court, on trial at circuit without a jury. The complaint alleged the issuing of a policy of fire insurance by defendant to one John White and damage to the property by fire; that after such partial loss it was agreed between defendant and the assured, that the latter should surrender the policy to be canceled, and defendants should pay $1,275 and the unearned premium, and that the policy was accordingly surrendered and canceled. Upon this contract the action is brought. The policy contained a condition that if the property was incumbered by mortgage or otherwise it must be expressed in the policy or the insurance would be void. Evidence was given tending to show that there were incumbrances on the premises not expressed in the policy. But there was no finding upon that subject or request to find.

[1] For other cases of refusal to allow recovery of money paid where there have been mistaken or disappointed expectations, see Lemans v. Wiley, 92 Ind. 436 (1883),—payment of mortgage, expecting reimbursement; Wunsch v. Boldt, 15 S. W. (Tex. App.) 193 (1890),—payment for digging well that later ran dry; Tyler v. Mayor, 7 N. Y. St. Reporter 265 (1887),—payment to city for water to be used in distillery, later closed by United States revenue officers; and see also Holt v. Thomas, 105 Cal. 273 (1894).

CHURCH, C. J.—* * * * 2. The settlement and contract to pay a specified sum operates as a waiver of any warranty in the policy unless the settlement and contract were procured by the fraud of the assured, and this is not found and scarcely claimed. It is said that the company did not know of the breach of the warranty at the time of the settlement. The answer is, that when the claim was made for the loss the company was required to ascertain the facts as to any breach of warranty. If they saw fit to pay the claim, or compromise it, or to make a new contract without such examination, it must be deemed to have waived it, and in the absence of fraud it cannot afterwards avail itself of such breach. It cannot urge payment or settlement by mistake on account of a want of knowledge of such breach. The time for investigation as to breaches of warranty is when a claim is made for payment, and if the company elects to pay the claim, or what is equivalent, to adjust it by an independent contract, it cannot afterward, in the absence of fraud, retract or fall back upon an alleged breach of warranty. (53 N. Y. 144.)

There is no finding upon which an allegation of fraud in obtaining the new contract can be predicated. The judgment must be affirmed.[1]

I. COMPROMISE OR SETTLEMENT.

SEARS v. GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN.

163 N. Y. 374—1900.

BARTLETT, J.—On the 31st of July, 1886, one Charles R. Baumgrass, residing in the city of Syracuse, became a member of a subordinate lodge of defendant, and received a certificate of membership, which provided, in the event of his death, the defendant would pay to his wife, Mary A. Baumgrass, the sum of $2,000. On September 28, 1886, Baumgrass disappeared, and was not seen or heard from thereafter until April 15, 1896, a period of nearly ten years. In the meantime important transactions and negotiations had taken place affecting the rights of the parties. Mrs. Baumgrass, the beneficiary, was advised to rest upon her rights until seven years had elapsed, when she might proceed under the legal presumption that her husband was dead. She waited about nine years, and then brought an action against defendant on the 23d of September, 1895, to recover $2,000 under the certificate of insurance. On the 26th day of March, 1896, and before the action was tried, she entered into an

[1] *Semble* accord, Stache v. Ins. Co., 49 Wis. 89 (1880); and see also Berkshire Mut. Fire Ins. Co. v. Sturgis, 13 Gray 177 (1859), Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221 (1869).

agreement of compromise with the defendant, under which her suit against it was discontinued, without costs. The agreement recited the facts, and provided for the settlement and discontinuance of the action; that the defendant should pay to the beneficiary "the sum of $666 in cash promptly"; that said $666 "is not to be returned in any event"; that $1,334 should be placed by defendant in the hands of a trustee, to be held by him until July 1, 1897, subject to the condition that if before that time the defendant should produce reasonable proof that the insured was alive the money so deposited was to be returned to it, but failing in such proof it was to be paid to the beneficiary, and, in the language of the agreement, "she shall take full title to the same." Twenty days after the execution of this agreement, and before the defendant had made the absolute payment of $666 as agreed, the insured was proved to be alive. Thereupon the beneficiary demanded payment of the $666, which was refused, and she assigned her claim under the agreement of compromise to the plaintiff. The facts are undisputed. The special term rendered judgment for plaintiff, which was reversed by the appellate division with a divided court.

The defendant rests its defense on the legal proposition that the agreement on which plaintiff seeks to recover was made while both parties thereto were laboring under a material mistake of fact, to wit, the supposed death of the insured, and is therefore unenforceable. The counsel for the defendant has cited us to many authorities to the general effect that where parties to a contract have entered into it under the impression that a certain state of facts existed, which proved to be error, equity will afford relief. This is a sound proposition of law, but it has no application to the facts in this case. The material facts may be briefly stated: The insured disappeared absolutely, leaving his wife as beneficiary under his certificate of insurance issued by the defendant. She waited nine years, and then sued to recover the total insurance of $2,000. In this situation the defendant seeks a compromise. It is not unreasonable to assume that the defendant regarded the chances of success in the litigation as decidedly in favor of the plaintiff. The legal presumption arising at the end of seven years that the insured was dead had existed for two years. What, then, was there to compromise in the action then pending? Clearly, but one thing was dealt with or could be in the agreement of settlement, to wit, the possibility that the insured should prove to be alive. That this was the basis of compromise upon which the agreement rested is perfectly apparent on the face of the instrument. The defendant said to the beneficiary: Give us sixteen months' more time to prove the insured is alive and discontinue your suit at once. If you do this, we will make you a cash payment of $666, which is not to be paid back in any event, and, at the expiration of the sixteen months, if we fail to prove the insured is alive, we will pay you $1,334, which is to be held for both of us by a trustee meanwhile, and, if we do prove it, the money is to be returned to us.

It is urged that there is no consideration for this agreement. The discontinuance of the action, the extension of time in which defendant was to pay the insurance, and the compromise of a doubtful claim were a sufficient consideration.

It is also urged that the trial judge found that when the agreement was entered into both parties believed the insured was dead. It was also found that notwithstanding such belief the contract recognized, contemplated, and provided for the possibility of the insured being alive. It is to be kept in mind that the present action is limited to the cash payment that was to have been made under the agreement, and in regard to which the defendant was in default at the time it was discovered that the insured was alive. This payment should have been made when the contract was signed, and it was then distinctly agreed that it should not be paid back "in any event," which meant it should not be repaid even if it were subsequently proved that the insured was alive. In view of all the circumstances, it cannot be said that the parties entered into the agreement laboring under a mutual mistake of fact. Mr. Pomeroy, in his work on Equity Jurisprudence (section 855, 2d Ed.), states the correct rule governing this case: "Where parties have entered into a contract or arrangement based upon uncertain or contingent events purposely as a compromise of a doubtful claim arising from them, and where parties have knowingly entered into a speculative contract or transaction, one in which they intentionally speculated as to the result, and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph, if the facts upon which such agreement or transaction was founded or the event of the agreement itself turned out very differently from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to a matter of fact and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief, either by way of canceling the contract and rescinding the transaction, or of defense to a suit brought for its enforcement. In such classes of agreements and transactions the parties are supposed to calculate the chances, and they certainly assume the risks." Again, in section 849, Mr. Pomeroy, after dealing with relief where a party is mistaken as to his legal rights, interests, or relations, closes with these words: "It should be carefully observed that this rule has no application to compromises, where doubts have arisen as to the rights of the parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or fact, are governed by special considerations." A number of instructive authorities are cited by the learned author under both of these sections.

It may be observed, in this connection, that the trial court found that there was no fraud on the part of the beneficiary, and, substantially, that she had acted throughout in good faith. The agreement

was in furtherance of a lawful compromise, and enforceable without regard to the validity of the beneficiary's claim under the original certificate of insurance. Compromises of disputed claims fairly entered into are final, and will be sustained by the courts without regard to the validity of the claims. Wehrum v. Kuhn, 61 N. Y. 623; White v. Hoyt, 73 N. Y. 505; Dunham v. Griswold, 100 N. Y. 224; 3 N. E. 76; Crans v. Hunter, 28 N. Y. 389; Mowatt v. Wright, 1 Wend. 355. The defendant, in executing the agreement of compromise, assumed the risk and calculated the chances of being placed in the present situation, and there would seem to be no reason in law or public policy why plaintiff should not recover. It would be a harsh rule, indeed, that would preclude insurer and beneficiary nine years after the insured had disappeared from entering into an enforceable agreement of compromise under the state of facts here disclosed. The judgment of the appellate division should be reversed, and the judgment of the trial term affirmed, with costs to the plaintiff in all the courts.

Parker, C. J., and Martin, Vann, Cullen, and Werner, JJ., concur. Gray, J., dissents.

Judgment reversed, etc.[1]

RHEEL v. HICKS.

25 N. Y. 289.—1862.

Action to recover back money as paid under mistake. On the 28th of February, 1856, the defendant, who was the superintendent of the poor of the county of Dutchess, was notified that one Louisa Hehr was pregnant of a child, likely to be born a bastard, and he thereupon applied to a justice of the peace to make examination. The justice took the examination of the woman in writing, wherein she testified, under oath, that she was so pregnant, and that Rheel, the plaintiff, was the father. Rheel was arrested, and on the 5th of March, 1856 (and before the examination of the two justices),

[1] Accord as to effect of mistake in cases of compromise, Stuart v. Sears, 119 Mass. 143 (1875); Troy v. Bland, 58 Ala. 197 (1877); and see especially the decision in Kowalke v. Milwaukee Elec. Ry. Co., 103 Wis. 472 (1899), and in Riegel v. Amer. Life Ins. Co., 153 Pa. 134 (1893). In the *Riegel* case a creditor who held a policy for $6,000 on the life of her debtor, whose whereabouts were unknown, finding it difficult to pay the premiums, made an arrangement with the insurance company, under which the policy was surrendered and a paid up policy for $2,500 was issued by the company and accepted by her in lieu of the policy surrendered. At the time of this transaction both parties acted on the supposition that the assured was alive, but he had then been dead for ten days. The creditor brought a suit in equity to compel the reinstatement of the policy, and it was held that the transaction was not in the nature of a compromise, but made under a mutual mistake of fact, and the policy was reinstated. (Paxson, Ch. J., and Mitchell, J., dissenting.)

In New York Life Ins. Co. v. Chittenden, 134 Iowa 613 (1907), the company was not allowed to recover back the amount of a life policy which it had paid in conscious ignorance as to whether the person who was the subject of the insurance was alive or dead.

compromised with the defendant relative to the support of such child. At the request of Rheel, the matter was compromised by his paying to the superintendent $50 in consideration of a full settlement and release for the child's future support. It appeared on the trial of the action (and so the jury found specially), that Louisa Hehr was not pregnant on the 28th of February, 1856; that she was never delivered of a bastard child of which the plaintiff was the father, and which became chargeable to the county of Dutchess; and that such county had been to no expense or damages on account of the woman or any child of which she was pregnant in February, 1856. The only witness to prove that there was no pregnancy was Louisa Hehr herself. On being inquired of, why she testified before the justice in February, 1856, that she was pregnant, she answered that she believed so then. Rheel had had connection with her two or three times, in November, 1855. Upon ascertaining that there had been no pregnancy, the plaintiff demanded the $50 of the defendant, who refused to pay it back.

The plaintiff had judgment for the $50, with interest and costs.

WRIGHT, J.—* * * * There can be no doubt of the general principle that, when one pays money without any legal obligation to do so, under a mistake of fact, and without the means of ascertaining the truth, he may recover it back. The cases founded on mistake, says SAVAGE, Ch. J., in Mowatt v. Wright (1 Wend. 355), seem to rest on this principle, that if parties, believing that a certain state of things exist, come to an agreement with such belief for its basis, on discovering their mutual error they are remitted to their original rights. Error of fact takes place, says the same learned judge, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. The question is, whether the law, as to the payment of money under the influence of a mistake, applies to this case. I think it does. The liability of a putative father for the support of his bastard child is created wholly by statute (he not being liable at common law), and the remedy there prescribed must be pursued. The statute authorizes a compromise and arrangement with the putative father relative to the support of such child. The compromise under the statute is merely a mode of getting indemnity on the part of the county for the support of the bastard. Whether the superintendent takes a bond or a sum of money, he but indemnifies the county against an actual or impending expense; and when there has been no expense to the county, and there is to be none, against which the money was paid as an indemnity, then the money, *ex aequo et bono,* belongs to the person paying it. The plaintiff was charged with being the father of a child likely to be born a bastard, of which Louisa Hehr was alleged to be pregnant. Both the plaintiff and defendant acted upon an erroneous assumption that she was pregnant, and they compromised relative to the support of the child that, it was supposed, would be born a bastard and become chargeable to the county. It is true that this compromise and settlement was made after the

arrest of the plaintiff, and after he had been charged with being the father of the child; but I do not think that, because the matter was in process of legal investigation, the plaintiff was concluded by such compromise from ever afterwards denying the pregnancy. The fact as to who was the father of the child may have been waived by the compromise, but not the vital fact which gave it all its force and without the existence of which the superintendent had no power to act, viz., the pregnancy of Louisa Hehr. There was no disagreement or compromise between the plaintiff and the defendant as to the fact of pregnancy. They both believed and acted upon the assumption that she was pregnant, and it turns out that they were both mistaken. As there was no pregnancy, the county has not been put to any expense, and never can be, and as the plaintiff paid his money to indemnify the county under a mistake of fact, I think he was entitled to maintain this action. It has been repeatedly held, that when money was paid under a mistake which there was no ground to claim in conscience, the party may recover back.

It is urged that this action cannot be maintained against the defendant, for the reason that he had no power to pay the money back. The superintendent, in compromising with the plaintiff, was acting under a special power conferred on him by law, and the money was paid to him in the first instance to provide for the child that was expected to be born. Bastards, it is true, are supported as paupers, and the superintendent has no power to retain moneys that may come into his hands, and disburse them for the support of the poor. He must pay over such moneys to the county or into the poor fund, and then draw on the county treasurer for all necessary expenses incurred in the discharge of his duties. It did not clearly appear in this case that the defendant had paid over the money to the county or into the poor fund. But if it had, it would have made no difference. I entirely concur with the learned judge who tried the cause, that "when it was ascertained that the woman had not been pregnant and that all parties had acted under a complete mistake of the fact, as the defendant would no longer hold the money for the original purpose, he simply held it for the plaintiff. He had then no more right to pay the money to the county, or place it in the poor fund, than he would have had to bestow it on any charitable object. If this action will lie at all, it cannot be defeated by the voluntary transfer of the money by the defendant after the cause of action had accrued."

The judgment of the Supreme Court should be affirmed.[1]

[1] But contra, where there was a dispute as to the fact of pregnancy, and compromise of the dispute. Thompson v. Nelson, 28 Ind. 431 (1867).

McKIBBEN ET AL. v. DOYLE.

173 PA. ST. 579.—1896.

ASSUMPSIT by David McKibben and James Wiley to recover money paid to Catharine Doyle by mistake. There was a verdict for plaintiffs, by direction of the court, and defendant appeals. Affirmed.

FELL, J.—The defendant, Catharine Doyle, claiming to own the party wall between her premises, No. 2009 Pepper street, and the adjoining premises, No. 2011 Pepper street, obtained an injunction restraining the owner of No. 2011 from using the wall without making compensation therefor. After the injunction had issued, the lot No. 2011, with the unfinished building, was sold at sheriff's sale, and purchased by Thomas J. Rose, who conveyed it to the plaintiffs. The plaintiffs, desiring to complete the building, tendered to the defendant the price of the party wall. She declined to receive the money unless they would pay also the costs of the injunction proceeding against the former owner of the property, and she attempted, by rule, to make them parties to the proceeding. At the hearing of the rule to show cause the tender was again made, and declined for the same reason. The rule was discharged November 25, 1893, and on January 3, 1894, at the request of the defendant, she was paid in full for the wall. It was subsequently ascertained that the defendant's grantor had reserved the party wall, and that she had no title to it, or right to compensation for it, and this action was brought to recover back the money which the plaintiff had paid her.

There is no ground for the argument that this payment was made in mistake of law, or in settlement or compromise of a doubtful right. The defendant asserted her ownership of the wall, and the plaintiffs, relying on her statement, at once agreed to pay for it, and tendered the price. She attempted to exact the payment of the costs of a legal proceeding to which they were not parties, and for which they were not liable. They refused to pay the costs, and the court refused to make them parties to the proceeding. This was the only litigation to be compromised, and there was no compromise of it. They successfully resisted her unfounded demand, and the proceeding, as far as it concerned them, was ended. Recognizing their duty to pay the owner of the wall, and relying upon her assertion of ownership, they paid her. It was a pure mistake of fact. The defendant sold what she did not own. There is nothing to take the case out of the rule that money erroneously paid under a mutual mistake of fact may be recovered back. The mere omission to take advantage of means of knowledge within the reach of the party paying does not prevent a recovery. Notes to Marriot v. Hampton, 2 Smith, Lead. Cas. 414; Meredith v. Haines, 14 Wkly. Notes Cas. 364. It was said in the latter case, "It is not sufficient to prevent a party from recovering money paid by him under a mistake of fact,

that he had the means of knowledge of tne facts, unless he paid it intentionally, not choosing to investigate the facts."

Judgment is affirmed.

WHEADON v. OLDS.

20 Wend. (N. Y.) 174—1838.

Assumpsit. The defendant agreed to sell to the plaintiff from 1,600 to 2,000 bushels of oats at 49 cents per bushel. The delivery of the oats was commenced by removing them from a storehouse to a canal boat; tallies were kept, and when the tallies amounted to 500, it was proposed to guess at the remainder; and after a while it was agreed between the parties to call the whole quantity 1,900 bushels, and the plaintiff accordingly paid for that quantity at the stipulated price. When the oats came to be measured it was ascertained that there were only 1,488 bushels delivered. It was then found that the mistake had happened by both parties assuming as the basis of the negotiation fixing the quantity of 1,900 bushels, that 500 bushels had been loaded in the boat at the time when they undertook to guess at the residue, whereas in fact only 250 bushels had been loaded,—the tallies representing *half-bushels* and not *bushels,* and that the parties supposed that the quantity loaded was not a quarter of the whole quantity. The vendor refusing to refund a portion of the money received by him, this action was brought by the purchaser, who declared for money had and received. The jury found a verdict for the plaintiff for $190.

Cowen, J.—* * * * The mistake as proved went not only to the quantity measured, but the jury found, under the charge of the judge, that relatively it influenced the entire agreement to take the oats at 1,900 bushels. One ingredient of estimating the residue, as talked of, was the assuming that the supposed 500 bushels was one-fourth of the pile, which would operate unfavorably to the plaintiff, if he reasoned from the size of the smaller to that of the larger pile. Here was an admitted error, which certainly influenced the conduct of the plaintiff to the extent of 250 bushels; and, as we must take it on the finding of the jury, to the full amount which the oats came short of the 1,900 bushels. All the excess of payment arose from a count of half-bushels as bushels. And the only question in the least open is, whether an agreement, based on that mistake, to accept the oats at the plaintiff's own risk of the quantity, shall conclude him. The mistake which entitles to this action is thus stated by the late Chief Justice Savage from the civil law: "An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." Mowatt v. Wright, 1 Wend. 360. He cites the words of 2 Ev. Poth. 437. And see 1 Dom. 248, B 1, tit. 18, § 1, pl. (2d Ed. par.

1224) 1. In judging of its legal effect, we must look "to the regard which the contractors have had to the fact which appeared to them to be true." 1 Dom. 250, B. 1, tit. 18, § 1, pl. 11 (2d ed. par. 1234). And when we see that the agreement is the result of such a regard, or, as the judge said to the jury, is based upon it, I am not aware of any case or dictum, that, because part of the agreement is to take at the party's own risk, or, as the parties expressed it here, hit or miss, it therefore forms an exception to the general rule. The agreement to risk was, *pro tanto,* annulled by the error. The money was paid under a contract void for so much as the oats fell short of 1,900 bushels. The effect would have been very different nad the truth been known to the plaintiff. See Domat, as before cited. The foundation of the arrangement to take at the plaintiff's risk was a misreckoning, one number being put instead of another, "which," says Domat, pl. 12 (2d ed. par. 1235), "is a kind of error in fact different from all other errors, in that it is always repaired."

The motion for a new trial is denied.[1]

---

2. PAYOR'S KNOWLEDGE OR BELIEF.

NATIONAL LIFE INSURANCE CO. v. JONES.[2]

1 THOMP. & C. 466 (N. Y. SUPREME CT., GEN. TERM).—1873.

APPEAL from a judgment for the defendant dismissing the complaint at the Ontario Circuit after trial by the court without a jury.

The action was brought by "The National Life Insurance Company of the United States of America," against the executor and legatees of Emma J. Mumford, deceased, to recover back $5,000 paid by said company upon a policy of insurance issued by it upon the life of Ira C. Mumford, deceased, and payable to his wife, Emma J. Mumford. The grounds upon which recovery was sought were that the policy was obtained by false and fraudulent representations, suppressions and concealments, and by fraudulent warranties in the application.

TALCOTT, J.—* * * * In the case before us, the finding, which seems to be abundantly sustained by the evidence, is not that the party paying acted under the "supposition" or "impression" that the policy had been fairly obtained, but the precise contrary, and that the plaintiff, at the time of the payment, actually, not only believed, but had considerable evidence to establish the existence of the precise state of facts which it now sets up to rescind the payment. The requirement that, in order to defeat such an action, the plaintiff

[1] Compare Calkins v. Griswold, 11 Hun 208 (N. Y. Supreme Ct. 1877).

[2] Affirmed by the Ct. of Appeals in 59 N. Y. 649, upon the opinion of TALCOTT, J., below.

must have paid with a "full knowledge of all the facts," which is the language of some of the cases, can mean nothing more than full notice of all the facts, and a confident belief in their existence; for actual, personal knowledge could rarely be attained. If the party paying has notice of and believes in the existence of the true state of facts, he has not paid under any mistake of facts, or upon the faith of any false state of facts.

The appellant's counsel seems to place great stress upon the circumstance that, on the trial of this case, evidence was developed which showed quite clearly that the belief of the plaintiff, at the time of the payment, that the policy had been fraudulently obtained, was correct, which evidence had not before been known to the plaintiff, but it seems to us this is not at all material. The plaintiff believing that a good defense existed to the demand might be unwilling to encounter the risk of undertaking to prove it, might doubt whether it could be proved with sufficient clearness to secure a verdict, and for that reason have concluded that it was better to pay than to encounter a litigation which might prove unsuccessful. In such case a payment is not made under a mistake of fact, but upon the ground that, notwithstanding the fact, it is for the interest of the party paying to make the payment, So, too, the finding that the payment was made not in reliance upon a false belief as to the facts, but from other motives, inclining the plaintiff to the belief that it was for its interest to assume the false state of facts to be true, and pay without further question or inquiry is a sufficient ground for sustaining the decision. If the payment be not solely in reliance upon a falsely assumed state of facts, but from mixed motives, so that the payer, while not believing the assumed state of facts, voluntarily waives all investigation or inquiry in view of, and influenced by other motives to the payment, he has not paid on the faith of a false state of facts, and thereby influenced to the payment, but upon other considerations. * * * *

The rule by which a party is enabled to recover back money paid under a mistake of fact does not authorize him to rescind a payment merely because he has changed his mind in regard to a matter of policy, or because he has come to a better position, so far as the facilities and probable result of a defense are concerned, but is based upon the idea of a *bona fide* and controlling belief in the existence of given facts, under the influence of which he has been induced to make the payment. Such, according to the findings and the evidence, is not this case.

The judgment must be affirmed, with costs of appeal.

Judgment affirmed.[1]

[1] In Guild v. Baldridge, 2 Swan (Tenn.) 295, 302 (1852), the court says: "Neither can recovery be resisted on the ground that the plaintiff, at the time of payment, may have entertained and expressed a vague *belief*, resting on no evidence, and amounting to nothing like conviction or moral certainty, that he had previously paid the debt."—In Chatfield v. Paxton, 2

KELLY v. SOLARI.

9 MEES. & W. (EXCH.) 54—1841.

ASSUMPSIT for money paid, money had and received, and on an account stated. Plea, *non-assumpsit*. At the trial before Lord ABINGER, C. B., at the London sittings after Trinity term, it appeared that this was an action brought by the plaintiff, as one of the directors of the Argus Life Assurance Company, to recover from the defendant, Madame Solari, the sum of £197 10s, alleged to have been paid to her by the company under a mistake of fact, under the following circumstances.

Mr. Angelo Solari, the late husband of the defendant, in the year 1836 effected a policy on his life with the Argus Assurance Company for £200. He died on the 18th of October, 1840, leaving the defendant his executrix, not having (by mistake) paid the quarterly premium on the policy, which became due on the 3d of September preceding. In November, the actuary of the office informed two of the directors, Mr. Bates and Mr. Clift, that the policy had lapsed by reason of the non-payment of the premium, and Mr. Clift thereupon wrote on the policy, in pencil, the word "lapsed." On the 6th of February, 1841, the defendant proved her husband's will; and on the 13th, applied at the Argus office for the payment of the sum of £1,000, secured upon the policy in question and two others. Messrs. Bates and Clift, and a third director, accordingly drew a check for £987 10s, which they handed to the defendant's agent, the discount being deducted in consideration of the payment being made three months earlier than by the rules of the office it was payable. Messrs. Bates and Clift stated in evidence, that they had, at the time of so paying the money, entirely forgotten that the policy in question had lapsed. Under these circumstances, the Lord CHIEF BARON expressed his opinion, that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiff could not recover, and that their afterward forgetting it would make no difference; and he accordingly directed a non-suit, reserving leave to the plaintiff to move to enter a verdict for him for the amount claimed.

East 471 (1709), *note*, ASHURST, J., says: "Where a payment had been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it was found to have been paid unjustly, the party might recover it back again."

In Frambers v. Risk, 2 Ill. App. 499 (1877), the court says (p. 504): "If a party be about to pay money upon a supposed state of facts, and he apprehend such facts do not exist and makes his objection to the payment on account of mistake, and the party about to receive the money proposes to have the matter tested and the truth ascertained, and the vendee refuses to apply the tests at hand and chooses to pay the money notwithstanding, he ought to be forever barred from recovering it back."

See also, Riegel v. Ins. Co., and New York Life Ins. Co. v. Chittenden, ante note, p. 270.

Thesiger, in the former part of this term, obtained a rule *nisi* accordingly or for a new trial.

LORD ABINGER, C. B.—I think the defendant ought to have had the opportunity of taking the opinion of the jury on the question whether in reality the directors had a knowledge of the facts, and therefore that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge. That is a very vague expression, and it is difficult to say with precision what it amounts to; for example, it may be that the party may have the means of knowledge on a particular subject, only by sending to and obtaining information from a correspondent abroad. In the case of Bilbie v. Lumley,[1] the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one,—where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment. I have little doubt in this case that the directors had forgotten the fact, otherwise I do not believe they would have brought the action; but as Mr. Platt certainly has a right to have that question submitted to the jury, there must be a new trial.

PARKE, B.—I entirely agree in the opinion just pronounced by my Lord CHIEF BARON, that there ought to be a new trial. I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the

[1] 2 East 469.

means of knowledge in his power, seems, from the cases cited, to have been founded on the *dictum* of Mr. Justice BAYLEY, in the case of Milnes v. Duncan;[1] and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it. But I agree that Mr. Platt has a right to go to the jury again, upon two grounds: first, that the jury may possibly find that the directors had not in truth forgotten the fact; and secondly, they may also come to the conclusion, that they had determined that they would not expose the office to unpopularity, and would therefore pay the money at all events; in which case I quite agree that they could not recover it back.

Rule absolute for a new trial.[2]

PARK, J., IN STANLEY RULE & LEVEL CO. v. BAILEY.

45 CONN. 464.—1878.

WE think the finding of the court below, that the money sought to be recovered in this suit was paid by the plaintiffs to the defendant through misapprehension of the facts with regard to their obligation to pay it, is decisive of the case. It is conceded that the plaintiffs are entitled to recover a part of the amount, and we think it is equally clear they ought to recover the whole. That part of it which is in dispute was paid to the defendant as a royalty for the privi-

[1] 6 B. & C. 671.

[2] In Norman v. Will (Ohio Supreme Ct. 1846), 5 West. Law Jour. 508 (s. c. 1 Oh. Dec. 261), which was an action to recover back money paid under a mistake of fact, the court below had charged the jury that "if the plaintiff had been, previously to said payment, informed of the note having been paid by Newton, then he could not recover it back again." On appeal BIRCHARD, J., says: "According to the instructions of the court below, a man's rights would depend upon the strength of his memory. We do not think so."

lege of manufacturing and selling certain articles, under certain patents, of which the defendant previous to this time was the owner. The money was paid according to the terms of a certain contract between the parties, wherein the defendant, for the consideration of a certain royalty to be paid on all the articles covered by the patents which should be manufactured and sold by the plaintiffs, granted them the privilege of manufacturing and selling them during the continuance of the patents and any extension of them. The plaintiffs manufactured and sold the articles, and paid the royalty according to the terms of the contract. In the meantime some of the defendant's patents expired and were not extended, but the plaintiffs being ignorant of the fact continued to pay the royalty as they had done before, and paid the sum which they now seek to recover on patents which had thus expired. The defendant knew that the patents had expired and had not been renewed at the time he received the money; but believing that he had the right to receive it under the contract, did not state the fact to the plaintiffs.

It further appears that the plaintiffs paid the money, believing that the patents were in force, and that they would not have paid it had they known the facts. But it is said that they had the means of knowledge, and that this is equivalent to knowledge itself. There may be such full and complete means of knowledge as to be equivalent to knowledge itself, but we think this is not such a case. The defendant owned the patents. He was in the employ of the plaintiffs. The patents were on a large number of articles; and some of them were covered by two or more patents of different dates. The case was a complicated one, and required thorough examination to determine the exact fact. It would naturally be expected that the defendant would keep himself informed on the matter, and being in the employment of the plaintiffs would inform them when the patents expired. This would reasonably be expected by the plaintiffs where they had no reason to suspect dishonesty in the defendant; and we think they had a right to rely on what would ordinarily be expected under the circumstances.[1]

[1] In Rutherford v. McIvor, 21 Ala. 750 (1852), the court says (p. 756): "I cannot yield my assent to the proposition, that the means of ascertaining the real facts of the case are tantamount to actual knowledge of them. If this were the rule, then it would be but rare that money paid by mistake could ever be recovered back. For instance: if, in the settlement of an account a mistake in the calculation was made, it could not be afterward corrected by suit, because the parties, having competent knowledge of figures, had the means of knowledge; and the mistake being the result of negligence, rather than the want of knowledge, the parties would be bound to abide by it." Accord, Waite v. Leggett, 8 Cow. (N. Y.) 195 (1828).

In Norton v. Marden, 15 Me. 45 (1838), the court says (p. 47): "But it is insisted that the plaintiff had the means of correct knowledge. And in one sense a person may be said always to have the means of knowledge. He may have access to books, and to the assistance and instructions of his fellow men. But the means of knowledge which the law requires are such as the party may avail himself of as then present without calling to his aid other assistance. And in this case there is no ground for inferring that the plaintiff

McARTHUR v. LUCE ET AL.

43 MICH. 435.—1880.

MARSTON, C. J.—Luce & Co., in demanding that McArthur pay them for logs cut, as they supposed, upon their land, acted in entire good faith. They had a survey made, and according thereto the plaintiff had cut logs over the line. When the claim was made upon the plaintiff he employed a surveyor and they went upon the land, and plaintiff then became satisfied that he had cut and taken logs from off defendants' land, and authorized a settlement to be made, which was done. This was in 1871, and all parties rested in the belief that a correct settlement had been made until some time in 1875, when a new survey established the fact that no logs had been cut upon defendants' land, and this action was brought to recover back the moneys paid, upon the claim of having been paid under a mistake of fact.

Where a claim is thus made against another who, not relying upon the representations of the claimant, has the opportunity to and does investigate the facts, and thereupon becomes satisfied that the claim made is correct and adjusts and pays the same, I think such settlement and payment should be considered as final. If not, it is very difficult to say when such disputed questions could be considered as finally settled, or litigation ended. In the settlement of disputed questions where both parties have equal opportunity and facilities for ascertaining the facts, it becomes incumbent on each to then make his investigation, and not carelessly settle, trusting to future investigation to show a mistake of fact and enable him to recover back the amount paid. One course encourages carelessness and breeds litigation after witnesses have passed beyond the reach of the parties: the other encourages parties in ascertaining what the facts and circumstances actually are while the transaction is fresh in the minds of all, and a final and peaceful settlement thereof. Detroit Advertiser & Tribune Co. v. Detroit, 43 Mich 116, and County of Wayne v. Randall, 43 Mich. 137.

The judgment must be affirmed with costs. The other justices concurred.[1]

had then the means of knowing that the true lot designated in the bond was not the one examined. He does not appear to have had any more satisfactory means of knowledge than the statements of the defendant, and those proved to be erroneous."

[1] Accord, Wheeler v. Hatheway, 58 Mich. 77 (1885).

WEST v. HOUSTON.

4 HARR. (DEL.) 170.—1844.

APPEAL from the judgment of a justice of the peace; in an action of assumpsit. Pleas, non-assumpsit, etc. Issues. The defendants below, the Messrs. West, originally brought an action of assumpsit in this court, against the plaintiff below, R. A. Houston, for $90, and recovered $44.50. The costs in that case were $15.15; and there was no affidavit filed to enable the plaintiffs to recover costs under sec. 37, Dig. 351. The costs were erroneously taxed by the prothonotary in making up the record, and the defendant in that case paid them, supposing that the plaintiffs had filed an affidavit under the above section, which would entitle them to costs. This suit was brought to recover back the costs so paid.

The Court ordered a non-suit. Where there is a payment in ignorance or mistake of a fact, it may be recovered back, unless the mistake arises from the negligence of the party to examine and take notice of information within his full means of knowledge. Here the plaintiff was party to the very record of the judgment which he was paying, which record showed the fact he now alleges he was ignorant of.

WINDBIEL v. CARROLL.

16 HUN (N. Y.) 101.—1878.

APPEAL from a judgment in favor of the defendant, entered upon a non-suit directed at the circuit. Xavier Misselbeck and Mary, his wife, executed and delivered to Davis L. Carroll, defendants' testator, their bond conditioned to pay the sum of $1,200, with their mortgage accompanying the same. Thereafter Xavier and Mary conveyed said real estate to Charles Windbiel, this plaintiff, subject to the lien of this mortgage, he assuming the payment of the same. Both Misselbeck and the plaintiff had made payments an said bond before such conveyance to Windbiel. On June 10, 1876, the plaintiff paid the balance claimed by the testator, Dr. Carroll, seven hundred and ten dollars and some cents. At that time plaintiff claimed there had been paid upon such bond and mortgage two sums which had not been credited thereon, one of $90.30 and the other of $164.66, together $254.96. And to recover said two sums so alleged to have been overpaid, this action was brought. On the trial, plaintiff produced a receipt for $164.66, given by Davis L. Carroll to Xavier Misselbeck, which amount was not allowed to the plaintiff when he made the above-mentioned payment on the bond and mortgage.

LEARNED, P. J.—When the plaintiff paid up the mortgage to Dr.

Carroll, he "claimed it was not right and that there was not so much due." He claimed that there had been an overpayment of $200 more than the doctor had credited him on the bond and mortgage. He said that he would pay the mortgage and would commence an action against the doctor to recover it back. There was a dispute between the plaintiff and the doctor about the amount due. And the plaintiff, when he paid the bond and mortgage, told the doctor that he would ascertain whether he had overpaid him, and if he had taken out of him more than was due, he would sue him. This is the testimony of the plaintiff's own witness, and it is not contradicted. Two or three days afterward the plaintiff commenced this action. The plaintiff, therefore, when he paid the bond and mortgage, knew (or believed) that he was paying more than was owing. The very fact on which he now seeks to recover was known to him and insisted upon by him at that time, and he made the payment with the intention of suing to recover part of it back again. What he has since discovered (as he claims) is not the fact that $200 more than was credited had been paid, but only the means of proving that fact.

Ignorance of a fact is one thing; ignorance of the means of proving a fact is another. When money voluntarily paid is recovered back, it is because there was a mistake as to some fact. But here the plaintiff was not mistaken as to the fact. Only at the time he did not know how to prove it. The subsequent discovery of evidence to prove a fact, known to the party when he makes the payment, cannot authorize a recovery back of the money. Such a principle would be most dangerous.

I think the judgment should be affirmed, with costs. BOCKES, J., concurred; BOARDMAN, J., dissented. Judgment affirmed with costs.[1]

---

3. WHEN NOT AGAINST CONSCIENCE FOR DEFENDANT TO RETAIN.

KINGSTON BANK v. ELTINGE.

66 N. Y. 625.—1876.

THIS was an action brought to recover back moneys alleged to have been paid by mistake.

The claim of the plaintiff, in substance, was that in January, 1854, the Huguenot Bank, of which defendant was president, recovered

[1] In Mowatt v. Wright, 1 Wend. (N. Y.) 355 (1828), Mrs. Wright brought suits for a claim which she thought well-founded. The court said (p. 365): "The defendants believed there was a defense, but they could not produce the evidence of it, like the case of the lost receipt [Marriott v. Hampton, 7 T. R. 269]: they therefore paid a sum of money as the easiest and cheapest way of settling the claim. It is a voluntary payment, though they would not have made it, could they have produced the evidence of their title at the time. It is now too late to call the settlement in question."

judgment against Nicholas Elmendorf and others, to the amount of $6,351.98, and issued executions thereon to the sheriff of Ulster county. In March, 1854, plaintiff recovered judgments against said Elmendorf and others to the amount of over $15,000, and issued executions thereon to said sheriff. Sometime in May, 1854, after the first executions had run out, but while plaintiff's were still in life, the sheriff levied upon a steamboat belonging to Elmendorf and subsequently sold it. Plaintiff and defendant's bank supposing the levy to have been made during the life of the latter's execution, agreed that the sheriff might take the notes of one Van Vechten, who bid off the steamboat, for the amount of his bid; subsequently, Van Vechten made payment on the notes, which were, with plaintiff's assent, and under said mistaken belief, paid over to defendant. This was substantially the aspect of the case as it appeared upon a former trial, where a judgment was rendered for defendant which was reversed by this court. (See 40 N. Y. 391.)[1] The court there found that the moneys paid to defendant's bank were the proceeds of the sale of the steamboat. The referee, however, before whom the second trial was had, did not find that the moneys paid to the Huguenot Bank were the proceeds of the sale of the steamer, but on the contrary that its judgments were paid direct to its attorney by Van Vechten, partly out of funds belonging to Elmendorf and the balance by his own note, nothing being said about the bid or the notes given therefor, and the same not having been presented; that Van Vechten, on such payment, demanded satisfaction of the judgments. He also found that none of the funds used to pay the executions belonged to plaintiff. The court here *held,* that the evidence was sufficient to sustain the findings, and that, even if the payment was made to defendant's bank under a mistake of fact in regard to the executions, the moneys paid could not be recovered back by the plaintiff, as neither plaintiff nor the sheriff ever had possession or title thereto. It also appeared, and the referee found in substance, that Elmendorf was the owner of real estate in Ulster county, upon which the Huguenot Bank judgments were prior liens, and which subsequent to their satisfaction was sold upon plaintiff's and other executions, and that plaintiff received upon its executions, out of the proceeds of such sale, an amount, at least, as much as was paid to and received by the Huguenot Bank, as aforesaid, and which, if its executions had remained in the hands of the sheriff and had not been returned satisfied, it would have been entitled to thereon. *Held,* that as the action was an equitable one, presenting the question as to which party the money *ex aequo et bono* belonged (Buel v. Boughton, 2 Den. 91, 93; Barber v. Cary, 11 Barb. 551, 552; Butler v. Wright, 6 Wend. 284; Eddy v. Smith, 13 id. 488, 490; Price v. Neal, 3 Bur. 1354), and as the plaintiff was not entitled to recover unless it was against conscience for defendant to retain the money, and as defendant received no more than his

[1] Reported herein at p. 295.

due and thereupon relinquished a lien from which plaintiff derived full as much benefit as if it had itself received the money, plaintiff, on this ground alone, was not entitled to recover.

Also, *held*, that it was not necessary to set up and prove these facts as a counter-claim; that they were admissible as showing that the equities were with the defendant.

MILLER, J., reads for affirmance.[1]

BUEL v. BOUGHTON.

2 DEN. (N. Y.) 91.—1846.

ERROR to the Onondaga C. P. Buel sued Boughton for money had and received to his use; and the case was substantially as follows: One Charlotte Smith held a bond against the plaintiff for $2,650, payable in six equal annual instalments, with annual interest from April 1, 1843. James H. Fuller, in right of his wife, owned and had an interest in the bond to the amount of $498.10. On the first day of April, 1843, the plaintiff gave James H. Fuller his negotiable promissory note for said sum of $498.10, having more than two years to run. The plaintiff agreed to make the note payable *with interest;* but interest was left out of the note by mistake in drawing it. On the day of the date of the note Charlotte Smith indorsed and receipted the amount of the note on the bond. On the day the note was given, James H. Fuller transferred it to Almerin Fuller, who indorsed the amount of the note on a bond which he held against James, which bond was on interest. This was done on the supposition that the note was also on interest. About twenty days afterward Almerin Fuller transferred the note to the defendant, who indorsed the amount of the note, and of the interest which was supposed to have then accrued upon it, on a bond which he held against Almerin Fuller, which bond was on interest. On the 23d of May, 1845, the plaintiff paid the note to the defendant, and by mistake, supposing the note to have been written with interest, paid the defendant $71.20 for interest on the note, and took it up. The plaintiff brought this suit to recover back the sum so paid by mistake for interest. The defendant set up the other facts which have been mentioned as an answer to the action; and the court decided in his favor. A verdict and judgment having passed for the defendant, the plaintiff now brings error on a bill of exceptions.

By the court, BRONSON, C. J.—This is a remarkable case. The plaintiff first omitted, by mistake, to make the note payable with interest, as he should have done; and then, by another mistake, he corrected the first error by paying interest, when the note itself

[1] Reported among the "Memoranda of causes not reported in full." Accord, Levy v. Terwilliger, 10 Daly (N. Y. C. P.) 194 (1881).

imposed no such obligation. And thus by two blunders the parties have come out right at last. Or at least, the plaintiff has paid no more than he ought to pay; and there would be no ground for an action to recover back the money paid for interest, if the payment had been made to James H. Fuller, the payee of the note, against whom the first mistake was made. One party would in that case have paid, and the other received just what in justice and honesty ought to be paid and received.

But the payment was not made to James H. Fuller; and this leads me to notice that not only the plaintiff and James H. Fuller acted from beginning to end under the mistaken supposition that the note was made payable, as it should have been, with interest; but the note was twice transferred, and both Almerin Fuller and the defendant took it under the same mistake of supposing it carried interest. Now as against the plaintiff, James H. Fuller had an equitable claim to have the mistake corrected, so as to give him interest on the debt. Then Almerin, having taken and paid James for the note as though it were on interest, had an equitable claim to have the mistake corrected, so as to give the interest to him. The same thing is true as between the defendant and Almerin. The defendant took and paid him for the note as though it carried interest. And thus by a series of mistakes the equitable claim to interest which was originally in James, passed from him to Almerin, and from Almerin to the defendant; so that, at the time the money was paid, the defendant was the person who was equitably entitled to receive it. He could not have sued the plaintiff for it at law in his own name; but in a court of equity the money would have been awarded to him, and not to James H. Fuller. It has come into the defendant's hands without suit, and from the person who ought to pay it; and I see no sufficient reason for requiring it to be refunded. Whether the defendant could sue at law in his own name to recover the money; or whether, having fairly got it, this action for money had and received to the plaintiff's use can be maintained, are very different questions. This is an equitable action, which may be defended upon the same equitable principles as those upon which it is maintained. As a general rule, the question is, to which party *ex aequo et bono* does the money belong; and in this case, I think it belongs to the defendant, who has got it. Let us suppose that the plaintiff had refused to pay the interest to the defendant; but, being liable to pay it to some one, he had paid it, either voluntarily or by compulsion, to James H. Fuller, between whom and the plaintiff the original mistake was made. James might then have been compelled to pay the money to Almerin; and Almerin to the defendant. Or if we begin at the other end, the defendant might have fallen back upon Almerin, and compelled him to correct the mistake by paying the interest; Almerin could have gone back in like manner upon James; and James upon the plaintiff. And so in any way of viewing the matter, the plaintiff was bound in equity and good conscience to pay the money; and the defendant was the man who in

equity and good conscience was entitled to receive it. He has got it; and to allow the plaintiff to recover it back, would be to make this the first in a circuit of four actions which would end in leaving the money just where it was at the beginning.

It is said that although the plaintiff has paid the interest to the defendant, he may be compelled to pay it again in an action on his bond to Mrs. Smith. But I think not. It fully appears that the principal sum of money for which the note was given belonged to James H. Fuller; and of course he was entitled to the interest which should afterward accrue on that sum. If the indorsement made on the plaintiff's bond would not of itself preclude Mrs. Smith from recovering the interest in question, it would clearly be enough to show in addition, that the plaintiff had corrected the error by paying the interest. But if the plaintiff should succeed in recalling the money, then undoubtedly Mrs. Smith, on proving the mistake in giving the note, and that the plaintiff had not corrected it, might recover this interest for the benefit of James H. Fuller. But by leaving the money where it is, the whole series of mistakes will be corrected, and all parties, unless it be the plaintiff, will be satisfied.

Judgment affirmed.[1]

[1] In Franklin Bank v. Raymond, 3 Wend. 69 (1829), the court says (p. 73): "The debt paid by the defendants was one that subsisted against them at the time of payment. The fact of which they were ignorant did not show that there was no debt existing at the time; it only showed that they were in a situation which enabled them to set off against the demand they had paid, a demand due to them. * * * * I do not find any case where money paid on a subsisting demand has been recovered back on the ground that the person making the payment has subsequently discovered facts that show he had a set-off against the demand."

PENSACOLA & ATLANTIC R. R. v. BRAXTON.

34 FLA. 471.—1894.

BRAXTON sued the railroad company for cattle killed by defendant's engines, cars, etc., and recovered judgment. Defendant appeals.

TAYLOR, J.—* * * * The defendant plead as a set-off to the plaintiff's claim, and proved at the trial, that the plaintiff had received, collected, and appropriated to his own use a voucher for $22.50 that the defendant company sent to its agent at Marianna, that was made payable to, and that was intended for, another person than the plaintiff, but who had the same name and initials as the plaintiff, viz., J. W. Braxton, and that the defendant's agent had by mistake delivered said voucher to the plaintiff, when it was not really intended for him. The plaintiff at the trial admitted the receipt, collection, and appropriation by him of this voucher for $22.50, but testified that on January 12, 1889, he had an ox killed by the defendant's trains, that had been reported to the defendant company by its section boss, and also by himself, and that had been valued by him at $25; that shortly afterward this voucher for $22.50 came, payable to J. W. Braxton (that was the way he always signed his name); and that, as the company had been in the habit of paying him a little less than his claims, and as he knew of no other J. W. Braxton but himself, he thought this voucher was intended for him in settlement for said reported ox, and that he so applied it; that all other vouchers paid him by the defendant company for stock killed were made out, just as that one was, payable to J. W. Braxton; that said ox, killed before said voucher came to him, was not included in this suit, and that he had never received any pay for it other than the proceeds of said voucher, and he considered it paid for in that way; that some eighty days afterward the company notified him that said voucher was not intended for him, but for another J. W. Braxton, and demanded the return of the money, but that he refused, under the circumstances, to repay it, and that no suit was ever brought against him to recover it.

On this state of facts the court charged the jury as follows: "If you are satisfied from the evidence that there was due from the defendant to the plaintiff, at the time said money was paid, the sum of $22.50 for and on account of damages done by the defendant to the plaintiff for other stock killed, which is not sued for in this action, and which said sum of $22.50 was applied to the payment of his (the plaintiff's) claim for the killing of such other stock, you will not allow the set-off." This charge is assigned as error, and raises the question as to when money can be recovered back that has been

paid by mistake. The law seems to be settled that money paid under a mistake of facts cannot be reclaimed, where the plaintiff has derived a substantial benefit from the payment, nor where the defendant received it in good faith in satisfaction of an equitable claim, nor where it was due in honor and conscience. 2 Greenl. Ev. (15th Ed.), § 123; Norton v. Marden, 15 Me. 45; Moore v. Eddowes, 2 Adol. & E. 133; Glenn v. Shannon, 12 S. C. 570; Foster v. Kirby, 31 Mo. 496; Brisbane v. Dacres, 5 Taunt. 143-163, 14 Eng. Rev. Rep. 718; Farmer v. Arundel, 2 W. Bl. 824. The right to recovery in such cases turns upon the question as to whether the party receiving the money paid by mistake can, in good conscience, retain it. According to the plaintiff's evidence, he had a just and legal claim against the defendant for an ox wrongfully killed by it, amounting to $25, and of which he had notified the defendant, demanding payment thereof. He received the voucher for $22.50 without fraud upon his part, but in good faith, believing it was his, and that it was given him in payment of his claim, and he so appropriated it. His claim seems never to have been settled otherwise. Under these circumstances, we do not think that the retention of the money by him necessarily involved any smartings of good conscience, and there was no error in the quoted charge of the court.[1]

[1] In Mansfield v. Lynch, 59 Conn. 320 (1890), the administrator, Bradley, who had by mistake as to the solvency of the estate paid in full the claim of the defendant who was a creditor, sought to recover back the money. The court, in replying to the contention of defendant that, as the estate did in fact owe her the sum paid, she had 'a right in good conscience' to retain it, said (p. 328): "In one sense it is true that the estate owed the defendant the amount overpaid, but it is not in any legal or moral sense true that it was the duty of the administrator to pay, or the right of the defendant to receive, her claim in full from the then known assets of the estate. Her right was only to receive her *pro rata* share with the other general creditors, and the unpaid balance still remained a claim in her favor against the estate. If she gets more than this it must be at the expense of the other general creditors or of the administrator. She did in fact get more than she was entitled to solely in consequence of an honest mistake. It is true that when the overpayment was made she had no knowledge of the condition of the estate or of the mistakes of Bradley, but such knowledge on her part is not made one of the conditions of recovery in the case cited, and after she obtained such knowledge she still refused to make the repayment. Can it then with reason be said she has 'a right in good conscience' to retain money which rightfully belongs to the estate, to which she is neither morally nor legally entitled, and which she obtained solely in consequence of an honest mistake which wrought her no harm whatever? Whatever meaning may be given to the somewhat indefinite phrase, 'right in good conscience,' we think it clear that the defendant had no such right as against Bradley under the circumstances to retain the overpayment." Accord, Woodruff v. Claflin, 198 N. Y. 470 (1910). The same rule applies where money has been paid to a legatee, under mistake of fact. Stokes v. Goodykoontz, 126 Ind. 535 (1890).

See also City of Louisville v. Zanone, 1 Met. (Ky.) 151 (1858).

4. EQUAL FAULT.

DEVINE v. EDWARDS.

87 Ill. 177.—1877.

Mr. Justice Dickey.—This was an action brought by Edwards against Devine, to recover the price of milk which had, before that time, been sold to appellant, and from time to time delivered. Defendant, in the circuit court, pleaded the general issue, and pleas of set-off, and on the trial offered evidence tending to prove that less milk had been actually delivered than was charged for, and less than he supposed at the time of receiving and paying for the same. Appellant, it seems, was a dealer in milk in the city of Chicago, and plaintiff (with his brother, now deceased), for a series of months, from time to time, shipped from the country milk in cans, supposed to contain eight gallons each. Upon that hypothesis the account of the vendor was rendered from time to time, and payment made by the vendee for all milk received up to the 1st of March, 1875, and for a part of the milk delivered on and after that day the appellant refused to pay, claiming a credit for a large amount of money on account of money overpaid prior to that date, as he claims, from time to time, by mistake, in supposing that the cans each contained eight gallons, when, in fact, as he alleges, a part of them were short and contained less than eight gallons. The testimony is voluminous and contradictory, and it seems to us that the weight of the evidence found in the record is in favor of the position of appellant. The verdict was for appellee, for the sum of $989.10, being very near the full amount claimed by him. After overruling a motion for a new trial, judgment was rendered against appellant upon the verdict.

Many points are presented by appellant as grounds for reversing this judgment. It is not necessary that we should consider more than one. The court, among other things, instructed the jury, at the request of appellee, "that if they believe, from the evidence, that before or during the time he received or was receiving the milk of the plaintiff, for which he now claims his set-off for shortage, the defendant * * * had such notice thereof, that by the exercise of ordinary prudence and diligence he would have known that plaintiff's cans were not up to the standard of eight gallons, and that plaintiff had no knowledge of any such shortage, and that defendant, with such notice and means of knowledge, paid the plaintiff in full for each month's milk, except the month of March, 1875, without any claim for shortage, then he cannot set off in this action any sum for such shortage * * * accruing since such * * * notice, except such shortage as may have accrued in that month of March."

We cannot give our sanction to the rule announced in that instruction. There is evidence tending to prove, that as early as 1870, and upon divers occasions after that, the attention of appellant had been called to the question whether appellee was or was not using

cans which were short in capacity, and that his suspicions had been aroused on that subject, and therefore had such notice as put him upon inquiry, and such as would have prompted a man of ordinary prudence to exercise such vigilance as would, if exercised, have discovered the deficit in quantity before the several payments were made, and it is insisted by appellee, that having omitted such vigilance, appellant cannot complain. This is not the law. The contract under which the milk was sold was for a given price per gallon. It was the duty of the appellee to see to it that his cans should hold the quantity which he professed that they held. It does not lie in his mouth to complain that appellant did not watch him with the care which the circumstances seemed to demand. If, in truth and in fact, by the mistake of appellant and that of appellee, the amount of the milk was short, and appellee received more money on that account than he was entitled to, he must account for the same, even though the mistake resulted from negligence on the part of appellant as well as on the part of appellee. The real question is as to the fact of the alleged shortage. If that existed, the appellant is entitled to have the wrong corrected by way of set-off. For this error the judgment must be reversed and the cause remanded for a new trial.

Judgment reversed.

MR. JUSTICE CRAIG—I do not concur with a majority of the court in the decision of this case. The question of fact, in my judgment, was fairly submitted to the jury, and the verdict should be held conclusive.[1]

[1] In Koontz v. Central National Bank, 51 Mo. 275 (1873), the facts were: Mrs. Koontz and Mrs. Simpson were each in the millinery business at Booneville. Both of them were customers of C. H. Tuttle of St. Louis, who was in the habit, from time to time, of drawing drafts on each of them for amounts due on their purchases, which drafts were sent to the Second National Bank of St. Louis for collection, and were collected and remitted. On the 7th day of July, 1870, Tuttle drew the draft out of which this controversy arose, on Mrs. Simpson for $100. The collecting officer of defendant by inadvertence and mistake, presented it to Mrs. Koontz instead of Mrs. Simpson, and Mrs. Koontz, under the impression at the time that she was indebted to Tuttle and that the draft was drawn upon her, paid the money and took up the draft. On the same day, defendant remitted the money to the Second National Bank, stating that the collection was on account of Mrs. Koontz. At this time, Mrs. Koontz and Mrs. Simpson were both solvent. No notice was given to the defendant of the error until the 1st of December, 1870, being after the defendant had remitted the money to Tuttle, and after Mrs. Simpson had become insolvent. The conclusion of the court is that "it is apparent that the parties acted under a mistake of fact, and that both were mutually in error, and if, in consequence of such mutual mistake, one party has received the property of the other, he must refund; and this without reference to vigilance or negligence. As the draft was wrongfully presented to the plaintiff, and it was paid by reason of a mutual mistake, I think that she is entitled to recover, and that the judgment of the court below should be affirmed."

5. PLAINTIFF NEGLIGENT.

UNITED STATES v. NATIONAL PARK BANK OF NEW YORK.

6 FED. 852 (DIST. CT. S. D. N. Y.)—1881.

CHOATE, D. J.—This is a suit brought to recover the sum of $100, paid under a mistake of fact. A jury trial has been waived. There is no dispute as to the facts. One Dunlap made application for bounty money, and in settlement of the claim a paymaster of the United States drew a draft on the assistant treasurer at New York for the sum of $100, payable to the order of Dunlap. The defendant received the draft from another bank for collection, indorsed in the name of Dunlap, and also indorsed by such other bank. Without indorsing the draft, the defendant presented it to the assistant treasurer in New York, and received the $100, on the 16th of March, 1869, and immediately thereafter allowed it as a credit in its account with the bank from which it was received. The indorsement of Dunlap's name was a forgery.

This is a clear case of payment under a mutual mistake of fact. It is claimed, however, for the defendant that the plaintiff cannot recover on account of its negligence in informing the defendant of the forgery after its discovery that the indorsement was forged. It is claimed that the plaintiff discovered the forgery when Dunlap made another application for the bounty, which he did on the 24th of February, 1879, and that no information of the forgery was communicated by the plaintiff to the defendant till February 3, 1880. It is not alleged in the answer, nor is there any proof, that the defendant has suffered any loss or damage by reason of this delay, or lost any remedy over against the party from whom it received the draft and to whom it paid the money. But it is contended that such delay is itself negligence of such a character that loss or damage will be presumed to have resulted from it. I think this point is not sustained, either by authority or the reason of the thing. Money thus paid under a mistake of fact is recoverable, because it is paid without any actual consideration, and cannot equitably be retained. The rule is equitable, and may be defeated where to allow the recovery would be inequitable. Negligence in the transaction, unattended with any loss or harm resulting from such negligence to the other party, surely does not impair the equity of the claim against him. Such negligence does not touch the reason of the rule allowing the recovery. If that negligence consists in delay in making the reclamation, with what justice can the party to whom the payment was made say that though he received the money under a mistake of fact, and was bound to return it a year ago, and could not justly or equitably keep it then, because it did not belong to him; yet, now that the party paying has neglected to let him know of his claim

after discovery of the mistake, he can justly and properly keep it? This would be absurd.

The authorities are to this effect: that negligence in giving information of the mistake to the other party, with the resulting loss of remedy over, is a defense, but otherwise not. The doctrine rests on the duty which the party paying owes to the other to shield him, as far as possible, from loss or damage resulting from the mistake, when he discovers that it is such. If the failure to perform that duty results in loss or damage to the other party, then it is inequitable that he should be obliged to refund.[1] But if that negligence has made no difference to him then it is immaterial. See Kingston Bank v. Eltinge, 40 N. Y. 391; Mayer v. The Mayor, 63 N. Y. 455; Pardee v. Fiske, 60 N. Y. 271; Union Bank v. Leath. Nat. Bank, 43 N. Y. 456; Allen v. Fourth Nat. Bank, 59 N. Y. 19; Bank of Commerce v. Mechanic's Banking Ass'n, 55 N. Y. 213; Continental Nat. Bank v. Nat. Bank Com., 50 N. Y. 575. These cases, it is true, are mostly cases where the negligence imputed was in making the payment or in not discovering the mistake, but I think the reasoning on which they proceed applies with equal force to cases where the imputed negligence is in giving information after discovery of the mistake. U. S. v. Union Nat. Bank, D. C., S. D. N. Y., April 24, 1879 [10 Ben. 408; s. c. 28 Fed. Cas. 333]; 2 Parson's Notes and Bills 597. The rule declared in Price v. Neal, 3 Burr. 1354, which precludes recovery where the mistake consists in the erroneous admission as genuine, by acceptance or payment of a draft where the signature of the drawer was forged, and the cases following it, are now regarded as exceptions to the general rule that negligence in making the payment, even where the matter mistaken was peculiarly within the plaintiff's knowledge, or one as to which he had a duty of inquiry, unattended with damage, does not defeat the action. Allen v. Fourth Nat. Bank, *ut supra;* and see Welch v. Goodwin, 123 Mass. 71. The cases cited by the defendant's counsel, where delay in giving notice that money received was counterfeit was held fatal to the recovery without actual proof of damage, are quite different in principle from this case. They proceed upon the theory that such delay, from the nature of the case, must necessarily impair the remedies over of the party from whom the money was received, and make it more difficult, if not impossible, for him to trace out the source from which he himself received it, or to find the guilty party and obtain restitution from him. Pindall's Ex'rs v. N. W. Bank, 7 Leigh (Va.) 617, and cases cited; Gloucester Bank v. Salem Bank, 17 Mass. 22. In the present case the defendant's answer shows that it received the draft from another bank, and its remedy over will be complete upon the plaintiff's recovery in this action. Merchants' Nat. Bank v. First Nat. Bank of Baltimore, 3 Fed. Rep. 66.

[1]Accord, Skyring v. Greenwood, 4 B. & C. (K. B.) 281 (1825).

I think there was no obligation on the part of the plaintiff to surrender or tender to the defendant, upon the trial, this draft. The possession of it was not necessary to a recovery over. I see no force in the argument, urged by defendant's counsel, that the plaintiff has no just claim, *ex aequo et bono,* because Dunlap cannot sue the government if the plaintiff recovers; nor is there any force in the suggestion that the suit is virtually one for the benefit of Dunlap, and that he has been grossly negligent. What the government may do with the money, or what its duty is toward Dunlap, are matters immaterial. The defendant has received the plaintiff's money, for which it gave no actual consideration, and is bound in law and *ex aequo et bono* to return it. It is unnecessary to consider the point made for the plaintiff that there was no such negligence in this case as the defendant's arguments have assumed, or that, if there was, it would not operate to defeat the action on the general ground that laches is not imputed to the government by reason of the negligence of its officers.

Judgment for plaintiff, with interest and costs.[1]

[1] In the Appleton Bank v. McGilvray, 4 Gray 518, 522 (1855), the court says: "It is no answer to the plaintiffs' claim, that the mistake arose from the negligence of the plaintiffs. The ground on which the rule rests is that money paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be justly retained by the party receiving it, consistently with a true application of the real facts to the legal rights of the parties, 2 Saund. Pl. & Ev. 2d Ed. 394. The cause of the mistake therefore is wholly immaterial. The money is none the less due to the plaintiffs, because their negligence caused the mistake under which the payment was made. The case would have been different, if it had appeared that the defendants had suffered any damage, or changed their situation as respects their debtor, by reason of the laches of the plaintiffs. But the facts show that their rights were wholly unaffected by the mistake under which the payment was made. Nothing occurred subsequently to the payment, which renders it unconscientious to recover the money back. It is therefore clear that the defendants have money belonging to the plaintiffs in their hands, to which they show no legal or equitable title. Kelly v. Solari, 9 M. & W. 54; Bell v. Gardiner, 4 Man. & G. 11; 2 Smith's Lead. Cas. 243, 244."

In Kingston Bank v. Eltinge, 40 N. Y. 391, 396 (1869), the court says: "Care and diligence are not controlling elements in the case. It is a question of fact merely. The inquiry is, are the parties mutually in error, and did they act upon such mutual mistake, not whether they ought so to have acted. If, in consequence of such mutual mistake, one party has received the property of the other, he must refund, and this without reference to vigilance or negligence. On a sale and purchase of real estate, the rule and the principle are different. It is a case of a bargain in which the law requires the exercise of care and attention. A party cannot then allege himself to be ignorant of a fact, of which he was put upon the inquiry, and of which he could have obtained a knowledge by reasonable diligence. In cases of bargains and sales, the rule is applicable, *vigilantibus non dormientibus leges subveniunt.* Such was the case cited of Taylor v. Fleet, 4 Barb. 95, and of which there are many instances in the books. But where there is no matter of contract, no bargain or sale, there is no call for the exercise of astuteness. The case then becomes one of fact. Was there or not an error between the parties? And the determination of that fact controls the result. Where this expression of the want of care and attention is used in reference to cases of simple mistakes of fact, by which one has thus received the money of another, and that it is thus used in many cases cannot be denied, the expressions have not been duly considered."

6. CHANGE OF DEFENDANT'S POSITION.

KINGSTON BANK v. ELTINGE.

40 N. Y. 391.—1869.

FOR a statement of the facts, see Kingston Bank v. Eltinge (66 N. Y. 625), reported herein at p. 283.

HUNT, CH. J.—* * * * The next proposition of the respondents [defendants] is, that by the discharge of their judgments they have lost their lien upon the real estate of their judgment debtors, and if compelled to refund would lose their debt. To state it in another form, they insist that the claim against them cannot be maintained, unless they can be restored to their original position, and secured from the intervention of other liens and purchases. This they say cannot now be done, citing Crozier v. Acker, 7 Paige 137. That was the case of a mistake of law. The chancellor says: "If this court can relieve against a mistake in law in any case, where the defendant has been guilty of no fraud, which is very doubtful, it must be in a case in which the defendant has lost nothing by the mistake, and where the parties can be restored to the same situation in which they were at the time the mistake happened."

The application of this principle to the present case would substantially destroy the rule that money paid in mistake of facts can be recovered by the payer from the receiver. If the facts could be so arranged, that there would be no loss to either party, there would be nothing to contend about, and no such actions would be brought. It is only where the retention or restoration of the money involves a loss that the parties are anxious about it. It is an ordinary result of the transaction, that the party receiving has incurred liabilities or paid money which he would not have done, except for the receipt of the money. I find no case, however, in which this has been held to relieve him from the performance of his duty. In the present case, the one party or the other, upon the facts found, will lose his debt. By cancelling their judgment, the respondents will have lost an available security. By failing to receive the amounts due to them upon their subsisting executions, the appellants will have lost their debt. One party or the other being compelled to lose, the question is, which shall it be. The answer given by the authorities is, that the party having the legal right must prevail. In the Canal Bank v. Bank of Albany, 1 Hill 287, which was an action by one bank to recover from the other the amount of a draft paid to it upon a forged indorsement of the name of the payee, the plaintiff recovered as for money paid by mistake, and it was held no defense to show that the defendant had collected the money as the agent of another bank in the city of New York, and had in good faith and without notice paid over the money to its principal. Here a loss was inevitable to the defendant or its principal, and it was impossi-

ble to restore them to the position of the holder of an unmatured and unprotected draft. They were held liable nevertheless. In Bank of Commerce v. Union Bank, 3 Comst. 230, the same principle is laid down and in the same manner. The Union Bank had paid to its New Orleans correspondent the money received from the plaintiff.

In Rheel v. Hicks, 25 N. Y. 289, a complaint had been made against the plaintiff that he was the father of a bastard child, of which one Louisa Hehr was pregnant, and upon the oath of the said Louisa. The plaintiff was arrested, and compromised the matter with the superintendent of the poor by paying him fifty dollars in consideration of a full settlement and release for the child's support. It turned out that the complainant was not pregnant with a child by any one, and that she was not delivered of a child at all. The plaintiff brought his action against the defendant to recover back the money paid, and recovered. This court also held that the fact that he had paid over the money to the county did not alter the case, although it was his duty so to pay over all moneys received for the support of bastards.

Neither of the propositions on which the judgment of the supreme court is supposed to be based can be maintained. There is nothing to except this case from the general principles applicable to its class, and, upon the facts found, the judgment should have been for the plaintiff.

The supreme court could readily vacate the satisfaction of the judgments and restore the defendants to their former position, so far as the judgment debtors are concerned. Should there have been *bona fide* purchases in the meantime, the case would be more complicated, and we are not called upon to say what would be the result. In any event, I think this consideration cannot prevent the plaintiffs from recovering the moneys justly due to them. Adams v. Smith, 5 Cow. 280; Barker v. Bissinger, 14 N. Y. 270.

The judgment should be reversed and a new trial granted.[1]

DANIELS, J., dissenting. * * * *

---

[1] Accord, Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74 (1883).

PHETTEPLACE v. BUCKLIN.

18 R. I. 297.—1893.

MATTESON, C. J.—This is an action of assumpsit to recover money paid to the defendant in ignorance of facts. The case was heard by the court of common pleas, without a jury, and judgment was rendered for the defendant for his costs. The plaintiff petitions for a new trial, and alleges that the judgment was against the evidence. The facts, which are undisputed, as shown by the report of the testimony, are as follows: Jane M. Woodward, late of Providence, died leaving a last will and testament in which William G. R. Mowry, also late of Providence, deceased, was named as executor, and who qualified as such by giving bond with Nathaniel S. Mowry and the plaintiff as sureties. The executor was not related to any of the persons interested under the will, nor does it appear that he had ever known Catherine C. Flagg, who was named in the will as a legatee. The executor, becoming involved financially, misapplied the funds of the estate of the testatrix, and became, as did also Nathaniel S. Mowry, the plaintiff's co-surety, utterly insolvent. The plaintiff, knowing the condition of the executor and his co-surety, and recognizing the liability which he had incurred as surety, requested his principal to furnish him with a list of the legatees to whom he was liable, and on receiving it on or about August 1, 1891, made his checks payable to the legatees named in the will for the amounts of their respective legacies, and gave them to the executor for delivery to the respective legatees. One of these checks was payable to Catherine C. Flagg, who, though named in the will as a legatee, had died without leaving a lineal descendant, in St. Louis, Mo., August 29, 1881, several years prior to the death of the testatrix. The plaintiff had no knowledge of her death, but supposed, and was led to suppose by the list furnished him by the executor, that she was then living; nor is there any evidence that the executor knew, at the time of furnishing the list to the plaintiff and the delivery of the check, of her decease. The check was delivered by the executor to the defendant and by him indorsed, "Estate of Catherine C. Flagg, Frederick A. Bucklin, Administrator," and deposited in bank, and paid by the bank on which it was drawn through the clearing house, and charged in the plaintiff's account. Two months or so after the delivery of the check to the defendant, the plaintiff first learned of the decease of Catherine C. Flagg, and

that she died prior to the testatrix, when called on by the attorney of the residuary legatees to pay them the amount of the legacy given to her, but which had lapsed by her death without a lineal descendant prior to the death of the testatrix. In the meantime the defendant, on or about September 2, 1891, had distributed the money received on the check to the legatees of Catherine C. Flagg, of whose estate he was administrator. One of these legatees resided in Providence, and the other in Melbourne, Australia. In November following, a written demand for the return of the money was made by the executor on the defendant. As the defendant did not comply with this demand, the plaintiff brought this suit.

As we have seen, the case does not show that either the plaintiff or the executor knew, or had reason to know, at the time of the delivery of the check to the defendant, that Catherine C. Flagg had died before the testatrix, leaving no lineal descendant, so that the legacy to her had lapsed. The check, therefore, on which the defendant obtained the money sued for, was delivered in ignorance of facts by reason of which neither the executor nor the plaintiff as his surety was under any liability to the defendant. The money obtained by the defendant on the check was money for which there was no consideration, and which the defendant in justice and good conscience was not entitled to receive. The principle is well settled that, if a person pays money which he was not liable to pay in ignorance of the facts, he may recover the money so paid. Garland v. Bank, 9 Mass. 408; Mayer v. Mayor, etc., 63 N. Y. 455; Bank v. Eltinge, 40 N. Y. 391; and see note to Mariott v. Hampton, 3 Smith Lead. Cas. 400 *et seq.* It is, however, subject to the qualification that, if it is inequitable to allow a recovery, the money cannot be recovered, but the person making the payment must bear the loss. Mayer v. Mayor, etc., 63 N. Y. 455. The defendant seeks to bring himself within this qualification, and contends that having paid the money received from the plaintiff to the legatees under the will of Catherine C. Flagg, one of whom resides in Australia, and is therefore not readily accessible, before the plaintiff or the executor demanded repayment, his position is so changed that it would be inequitable to allow the plaintiff to recover. We do not think it is enough to relieve the defendant from liability that he has paid the money to others, even though such payment was made before a repayment was demanded. He must show that a recovery by the plaintiff would be inequitable.[1] If at the time he received the plaintiff's money he knew that Catherine C. Flagg had died before the testatrix, leaving no lineal descendant, so that the legacy to her had lapsed, he was bound to have communicated those facts to the plaintiff or to the executor. When a person pays money in ignorance of circumstances with which the receiver is acquainted, and which, if disclosed, would have prevented the payment, the parties do not deal on equal terms, and the money is held to be unfairly

[1] Accord, as to burden of proof, Mayer v. Mayor, 63 N. Y. 455 (1875).

obtained, and may be recovered. Martin v. Morgan, 1 Brod. & B. 289; George v. Taylor, 55 Tex. 97; 8 Amer. & Eng. Enc. Law, 645, note 4; Kerr, Fraud & M. 99. The testimony on the part of the defendant does not negative such a state of facts, and certainly, if such a state of facts existed, it would not be inequitable to permit the plaintiff to recover, even if the defendant had paid the money to others before demand for its repayment.

Again, assuming that the defendant had no such knowledge, but received the money innocently, he should at least show that he has made some effort to restore the money, or that such effort would be unavailing. The testimony does not show that he has made the slightest effort in that direction, not even that he has reqnested the legatee here in Providence to give back the portion of the money received by such legatee. It is possible that a simple request to the legatees, accompanied by a statement of the facts showing the injustice of their retention of the money, would result in their returning it to be restored to the plaintiff. Until all reasonable efforts have been made by the defendant to get back the money, and have proved unavailing, how can it be said that it would be inequitable to permit a recovery?

But assuming again, that such efforts had been made, and had proved unavailing, we think it may well be doubted whether such a state of facts would be enough to render a recovery by the plaintiff inequitable. To have that effect, must there not be something besides the mere payment of the money by the plaintiff which has caused the position of the defendant to be changed? Must there not be some negligence or laches on the part of the plaintiff in not promptly demanding repayment of the money on discovery of the true state of facts, but for which the defendant's change of position might not have occurred? In Durrant v. Commissioners, L. R. 6 Q. B. Div. 234, it was held that a plaintiff who had paid by mistake a tithe rent charge for lands not in his occupation could recover the amount from the defendants, though, at the time when he discovered his mistake, the remedy of the defendants against the lands actually chargeable had become barred. Again, in Bank v. Eltinge, 40 N. Y. 391, the sheriff, having received an execution issued on a judgment in favor of the defendant, and afterwards one on a subsequent judgment in favor of the plaintiff against the same defendant, and before the last had run out, but after the sixty days had expired as to the first, made a levy on personal property not sufficient to satisfy both, sold it, and paid over the proceeds to the defendant in satisfaction of his execution, with the assent of the plaintiff, neither party knowing that the execution had run out before the levy, but supposing the contrary. It was held that the plaintiff could recover the money as paid under a mistake of fact, though the defendant's judgment had been in consequence of the receipt of the money canceled and discharged of record. And see Standish v. Ross, 3 Exch. 527; Rheel v. Hicks, 25 N. Y. 289; National Bank

of Commerce v. National Mech. Bank. Ass'n, 55 N. Y. 211. In the case at bar neither the plaintiff nor executor learned the true state of the facts till the plaintiff was called on by the attorney for the residuary legatees to pay to them the amount of the legacy which the plaintiff had already paid to the defendant. The precise date when this demand on the plaintiff was made does not appear. The plaintiff testifies that it was two months or more after he had made the check and placed it in the hands of the executor for delivery. It is not claimed, however, that the demand on the plaintiff by the attorney of the residuary legatees was before the defendant had distributed the money, and, consequently, no negligence or laches on the part of the plaintiff after discovering the facts could have had any effect in causing the defendant to change his position by the payment of the money; and, if not, it is difficult to see how there can be any equity in his favor to prevent the plaintiff's recovery.

The defendant contends that the check, having been made payable to Catherine C. Flagg, was illegally paid by the bank on the defendant's indorsement, and, therefore, that the bank could not charge the payment to the plaintiff's account; that the payment is to be regarded as a payment from the money of the bank, and not from the plaintiff's; and hence that the plaintiff's remedy is against the bank, rather than the defendant. While it is perhaps true that the check was illegally paid by the bank, and that the plaintiff, if he had seen fit, could have proceeded against it, we do not think that he was compelled to do so, but that it was competent for him to ratify or adopt the payment, and to proceed against the defendant. Plaintiff's petition for a new trial granted.

BEHRING ET AL. v. SOMERVILLE.

63 N. J. L. 568.—1899.

ACTION by Albert F. Behring and others against Alonzo Somerville. Judgment for plaintiffs. Defendant brings error. Reversed.

VAN SYCKEL, J.—This case was tried below before Mr. Justice DEPUE, by consent of parties, without a jury. The said justice found the following facts: On the 5th of February, 1885, Mrs. Behring executed a mortgage for $500 to William King. William King's executors, on the 23d of October, 1886, assigned said mortgage to Isaac W. King, which assignment was recorded November 22, 1886. Isaac W. King assigned this mortgage, and also a mortgage against one Hartman for $700, to one Mott, April 29, 1890, to secure a note for $1,000. This assignment was recorded in February, 1892. Judgment was obtained by Mott against Isaac W. King on this note in

May, 1895, for $1,200.66. King is insolvent, and resides out of this state. King retained possession of the Behring bond and mortgage after he assigned it to Mott, and on the 25th of March, 1893, assigned it to the said Somerville to secure the sum of $325, which assignment was recorded November 3, 1893. Somerville had the records searched before he took said assignment, and the prior assignment to Mott was overlooked. On the 11th of October, 1893, Mrs. Behring, at King's request, went with him to Somerville's office, and there paid the principal sum due on the mortgage; the interest being abated by an arrangement between King and Mrs. Behring. Mrs. Behring gave Somerville $325, and paid the balance to King. The mortgage was produced by Somerville, and a receipt directing the county clerk to cancel it was signed by King and Somerville, and then King went with Mrs. Behring to the clerk's office, and took the receipt and mortgage, and had the mortgage canceled of record. The receipt was as follows: "County Clerk of Essex county: The within mortgage being fully paid and satisfied, please cancel the same of record. Isaac W. King. A. Somerville." Neither Mrs. Behring nor Somerville had actual notice of the assignment to Mott. This suit was brought by Mrs. Behring to recover from Somerville the money which she paid him on account of the mortgage. By agreement of the respective parties, it was submitted to the supreme court, upon the facts found as aforesaid, whether Mrs. Behring was entitled to recover of Somerville the said sum of $325, and that the said special case might be turned into a special verdict. Thereupon the supreme court, being of opinion that Mrs. Behring was entitled to recover, at the request of the attorney of Somerville, ordered that said special case be treated as if a special verdict had been rendered by a jury of the above-stated facts as found by said justice of the supreme court, and, upon motion of the attorney of Mrs. Behring, entered judgment upon said verdict in favor of Mrs. Behring and against Somerville for the sum of $430.50. The writ of error in this case is prosecuted to review the judgment of the supreme court.

It appears by the facts found that neither Mrs. Behring nor Somerville had actual notice of the assignment to Mott, and there is no evidence whatever to charge Somerville with fraud or want of good faith in this transaction. The statute authorizing the recording of assignments of mortgages provides that such record shall be notice of such assignment to all persons concerned from the time the assignment is left for record. Both Mrs. Behring and Somerville are therefore chargeable with constructive notice of the previous assignment to Mott, but, neither having actual notice, the mistake of fact upon which they acted was mutual, each believing that Somerville had a valid assignment of the mortgage, subject to no paramount equities, and each having equal and adequate means of ascertaining the real situation by reference to the record. In Deare v. Carr, 3 N. J. Eq. 513, the chancellor said: "There are a great variety of cases in which relief will be afforded; so many, indeed, as

to have given rise to the general rule that an act done, or a contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity. The rule has a number of important qualifications or exceptions, and these are often as important as the rule itself." After discussing the authorities, Chancellor VROOM classified the case in hand with the exceptions to the general rule, for the reason that the party seeking relief on the ground of a mistake of fact could have ascertained the true situation by reference to the record of mortgages. As applicable to that case, where a purchase was made at sheriff's sale, the parties acting in like ignorance of the record, he lays down the rule that where the fact is equally unknown to both parties, or where each has equal and adequate means of information, and both have acted in good faith, the court will not interfere.

The right of a debtor to recover from his creditor money paid by mutual mistake, in excess of what is due and owing, is not questioned, because there the position of the creditor is in no wise injuriously affected by requiring him to restore the overpayment. But in the case *sub judice,* both parties having acted in ignorance of a material fact, neither can claim a right to relief superior to the other. They must be left in the position in which they placed themselves. Somerville had in fact good title to the mortgage, subject to the right of Mott, the prior assignee. He had a right to receive payment of his note, and surrender his claim upon the mortgage he held as collateral. He did that in the presence of Mrs. Behring, the mortgagor, who paid him the amount due him, and also in the presence of King, who had assigned and delivered the bond and mortgage to him. Somerville was under no legal obligation to ascertain whether any equities prior to his own existed, and give such information to Mrs. Behring. Somerville in this transaction surrendered his assignment, and lost his legal hold upon the bond and mortgage, as security for his claim against King, and Mrs. Behring cannot call upon him to return the money paid by her without restoring him to his position. That was recognized as the correct legal rule in Shand v. Grant, 109 E. C. L. 323, where the court refused to allow a recovery of money paid under a mistake of fact as against persons who had changed their position in good faith, believing the payment to have been rightly made.[1] The judgment of the supreme court should therefore be reversed. * * * *

[1] But see the comment on this case in Newall v. Tomlinson, post, pp. 312, 313.

WALKER v. CONANT.

69 MICH. 321.—1888.

ASSUMPSIT. Plaintiff brings error. Affirmed.

MORSE, J.—* * * * Stripped of all sophistry, the naked case is this: Van Riper obtains $3,000 of the plaintiff upon a forged mortgage,[1] and, out of the money so obtained, pays Mrs. Conant the debt he owes her, which is evidenced by a forged note, and secured by a forged mortgage upon the same premises described in mortgage to plaintiff. The money is honestly her due, and she has an equitable right to demand and receive it of Edgar [Van Riper]; and, believing her securities to be genuine and valid, she takes the money and surrenders them up to him to be cancelled and destroyed, and in utter ignorance of the fraud perpetrated upon the plaintiff by Van Riper. It is the same, in fact and in legal effect, in my opinion, as if the $3,000 had been paid direct to Van Riper by Walker, and he had taken the money away, and out of it afterwards paid the debt to Mrs. Conant, and received the note and mortgage direct from her hands.

In such case, it seems to me, under all the authorities, that the fact that the plaintiff or his agent supposed his bond and mortgage to be genuine, and the Conant mortgage to be a valid lien upon the premises, cuts no figure in the case. It is not a case where he has purchased the Conant mortgage as an investment, believing it to be valid. It is not a case where he has parted with his money, and received a void security which he would not have bought had he known it to be false and forged. But, in the present case, he was loaning the $3,000 upon an $8,000 farm, and, as he supposed, upon good security. This was the main and absorbing transaction. The payment and discharge of the Conant mortgage was but an incident of his dealing. If the mortgage had not been in existence, Van Riper would have obtained the same sum, $3,000, upon the bond and mortgage delivered to E. C. Walker. Being in existence, and preventing, until discharged, a first mortgage upon the premises, Walker stipulated that this mortgage should be released out of the funds paid by him to Van Riper upon the loan. Walker would have been equally satisfied, no doubt, if Van Riper had paid the Conant mortgage before receiving any money upon the mortgage executed to Helen M. Dudley,[2] and assigned to plaintiff, or if he had taken the money after it was paid to him and procured the release of Mrs. Conant. The plaintiff was not buying or paying off

[1] The mortgage purported to be executed by the father of Van Riper upon the father's land.

[2] This mortgage upon which Walker loaned his money was taken in the name of Helen M. Dudley, but was immediately assigned to him.

the Conant mortgage; he was loaning $3,000 to Van Riper's father, as he supposed, upon good security.

But Mrs. Conant would not have parted with her securities without the payment of the debt, and, if this money can be recovered back from her by the plaintiff, her situation is changed, and without her fault, beyond all possible return or restoration. Her note and mortgage have been destroyed by the joint action of Van Riper and the plaintiff's agent, and cannot be returned to her. She has therefore lost the power that the possession of these papers might have given her in the collection of her debt, and it is therefore most inequitable to hold that she shall not only lose her debt, but also the evidences of it (false though they may be as against the elder Van Riper), for the benefit of the plaintiff, who has been equally negligent with her in making these loans, and through whose negligence, and with no fault of hers, she has lost her note and mortgage beyond recall, which note and mortgage she would not have surrendered except upon the payment of her debt.

A reference to the opinion filed when the case was here before [65 Mich. 194], and the authorities there cited, is sufficient to show that, under the case as now made, the plaintiff cannot recover. He must bear the consequences of his own negligence, as the situation of Mrs. Conant has been changed by his acts so that in equity she cannot be asked to return the money. She received it in good faith, in satisfaction of a just and equitable claim, and when it was due on honor and in conscience. Walker v. Conant, 65 Mich. 197, 198 (31 N. W. Rep. 787, 788). And the authorities are uniform that where the money is received in good faith, and in the ordinary course of business, and for a valuable consideration, it cannot be recovered back because the money was fraudulently obtained of some other person by the payor. To hold otherwise would be to put every man who receives money in the due course of his business upon inquiry, at his peril, as to the manner in which such money was procured by the payor. Justh v. Bank, 56 N. Y. 484; Mason v. Waite, 17 Mass. 563; Warren v. Haight, 65 N. Y. 171, 178; Reed v. Bank, 6 Paige 337; Currie v. Misa, 12 Moak, Eng. R. 592, 605; Watson v. Russell, 31 L. J. Q. B. 304; Rapalje v. Emory, 2 Dall. 51, 54; Stevens v. Board, etc., 79 N. Y. 183.

The judgment should be affirmed with costs.

CHAMPLIN and LONG, JJ., concurred with MORSE, J.

SHERWOOD, C. J. (dissenting).—* * * * It is said by my Brother MORSE, in regard to Mrs. Conant's giving up her note and mortgage: "Her situation is changed, and without her fault, beyond all possible return or restoration." If by this it is meant she has given up for destruction a forged note and mortgage which she received for a loan of money made, it is true; but if by it is meant that her legal or equitable rights are changed, in the event she is obliged to return the money she received of Mr. Walker, I confess my inability to discover such change. She certainly never had any right, legal or equitable, to have this money of Mr. Walker, unless a

forged note and mortgage can be regarded as legal; neither were they of any validity or value to her when they were in existence and in her hands. She had a valid claim against Van Riper, the forger, but never had one against the plaintiff, or any one else; and when he paid the money to her it was under a mutual mistake of facts.

To hold such a payment valid, and give the payee the benefit of the same, would be unjust and inequitable, and I can never consent to a judgment which will allow the felonious transactions of a criminal to have the effect and be governed by the same rules which regulate the good-faith dealings and transactions of honest people. I know it is said that she has lost her note and mortgage, and "Has therefore lost the power that the possession of these papers might have given her in the collection of her debt; and it is therefore most inequitable to hold that she shall not only lose her debt, but also the evidences of it (false though they may be as against the elder Van Riper), for the benefit of the plaintiff; * * * * and that she would not have surrendered the mortgage but for the payment made."

It is a little difficult to see how the possession of these forged papers, under the circumstances, could have aided her in the collection of her debt. The forging does not appear to be questioned by any one. It is conceded by the parties, and the evidence to prove it remains entirely sufficient. If these void papers could have given her any aid in making collection against the insolvent forger, it does not appear in the record, and I know of no reason which suggests it. The fact that the defendant would not give the release of her mortgage until she was paid the amount it called for was the very reason why Mr. Walker made the payment he did to her. Upon the claim thus made, I can find no facts upon which to base the claimed injustice in requiring a return of the money to Mr. Walker. The rights of no other parties have intervened or are involved in the case. No *bona fide* rights of other innocent persons are to be protected. Under the circumstances stated in the record, the money sued for in the possession of Mrs. Conant was Mr. Walker's money. She received it of him without any consideration whatever, and upon an unquestionable mistake of facts, for the existence of which neither party was in fault or to blame; and to hold otherwise I can but regard as a misapplication of the equitable principles governing the rights of these parties, and which are applicable to the case. The judgment should be reversed, with costs, and a new trial granted.[1]

[1] In Standish v. Ross, 3 Exch. 527 (1849), the court says (534): "It is in respect of the delay of the remedy only that the defendant could not be put *in statu quo*. We think these circumstances form no impediment to the right to recover, if money were paid over under an ordinary mistake of fact; it could not be any bar to the recovery of it, that the defendant had applied the money in the meantime to some purchase which he otherwise would not have made, and so could not be placed *in statu quo*."

See "Change of Position as a Defense to an Action for Money Paid by Mistake," by C. H. Tuttle, 63 *Albany Law Journal* 147; and "Change of Position as a Defense in Quasi-Contracts," by Professor Costigan, 20 *Har. L. Rev.* 205.

CARSON v. M'FARLAND.

2 RAWLE (PA.) 118.—1828.

HUSTON, J.—The case stated was to be considered as a special verdict. The following is an abstract of the facts: On the 15th of May, 1822, Thomas Carson, the plaintiff, took out letters of administration on the estate of John Huston, deceased. He filed an inventory in due time, and held a vendue of the personal property, which personal property amounted to above four thousand dollars. On the 14th of March, 1823, Thomas Carson paid to the defendant two hundred and twenty-three dollars and forty-six cents, being the amount of a single bill given by John Huston, in his lifetime, to the defendant. John Huston was one of the sons of James Huston, deceased, and had shortly before his death taken, under a decree of the Orphans' Court of Franklin county, a part of his father's estate, at an appraisement, and entered into recognizances to pay to his brothers and sisters their shares of the said lands. In August, 1823, his administrator, Mr. Carson, applied in due form of law to the Orphans' Court, for an order to sell the lands of John Huston, deceased, to enable him to pay the debts. Not being able to obtain a satisfactory price, the order was continued at several subsequent courts; and, in February, 1825, the land was sold for eight thousand four hundred and fifty dollars, and in April following, the sale was confirmed. It now appeared, that the proceeds of the whole real and personal estate would not pay the debts of the deceased; and, on application of the administrator, the court appointed auditors to apportion the money among the creditors. In April, 1827, their report was made and confirmed by the court. By this report the whole proceeds were required to pay debts of a higher degree than specialities; in fact, the recognizances were not all paid, but the conusees have received something less than their whole debts.

The plaintiff then brought this suit to recover back from John McFarland, the defendant, the sum of two hundred and twenty-three dollars and forty-six cents, alleging it was paid him under a mistake as to the solvency of the estate. There was no allegation of any actual wasting by the administrator; the deficiency arose from the accumulation of interest and the depressed price of lands. It will be observed that, in this case the administrator paid the money within the year, and to a person undoubtedly a creditor of the estate; and that, if there was any mistake as to the solvency of the estate, such mistake arose, not from any statement or representation of the defendant, but from some other cause.

The law, as it regards the liability of administrators or executors, and how far, and under what circumstances, they may become personally liable for the debts of the estate they represent, is not an unimportant part of our jurisprudence. I do not mean to go out of the present case, or even to hint an opinion on some of

the topics discussed, and which must present themselves to the mind. In England, after some variance of decision, it seems to have been settled at one time, that a creditor, or even another legatee, could, in some cases, compel a legatee, who had received his legacy, to refund, in case of a deficiency of assets. This is, however, with some restriction; for, if the assets were sufficient at the decedent's death, but were wasted by his executor, there was no refunding in favor of the legatee, or perhaps of the creditor; and a further distinction seems to have existed, as to refunding in favor of the legatee or creditor, when the executor was insolvent, and in favor of the executor, who would lose, unless he could compel those who had received to refund. See 1 Vern. 94, 460, 469; 1 P. Wms. 495; 1 Anstruther, 112; Com. Dig. 630; Chancery, Legacy (3 G. 3); 1 Vern. 162; 2 Johns. Chan. 626, 627.

But even there, on reading carefully the cases cited, there will be found some reason to believe it was only where refunding receipts were taken, or in consequence of the peculiar jurisdiction and authority of the Court of Chancery, that any one, who had received only what was at the time supposed due to him, would be compelled to refund. 2 Com. Dig. Chan. (3 G. 3); 2 Ventris 360. There is in 1 P. Wms. 355 (Pooley *et al* v. Ray), a *dictum* of the master of the rolls, that a creditor who has received money due him from the estate, may be sued, and compelled to refund in favor of another creditor; but, on a rehearing of the case, nothing is said on this subject. 2 P. Wms. 291, 297; Coppin v. Coppin, 2 Ves. 192. There is not, it is believed, in the English authorities before our Revolution, any direct decision, that a creditor, who has been paid a debt due him, may be compelled to refund in favor of another creditor though it must have often happened, that one received all the assets and another received nothing, or was paid out of the estate of the executor; and there are express decisions to the contrary. See 2 Ventris 260; Com. Dig. Chancery 393.

In this case, the administrator paid money justly due, and paid it within the year allowed by our law, to ascertain the situation of the estate. The assets were, or ought to have been, better known to the administrator, than anybody else. No accidental failure of the fund occurred, to any material extent; the defendant has no money to which in honesty and conscience he is not entitled, as against the estate of the deceased. The hardship on the plaintiff may be great. The hardship on the defendant, if called on to refund, would not be small; and the confusion, inconvenience and general uncertainty which would follow from a decision, that, an honest creditor, who had gotten an honest debt, was liable to be sued, and compelled to repay, would be so great, would make the settlement of estates so uncertain and so interminable, that we think the plaintiff ought not to recover.

Judgment affirmed.[1]

[1]Accord, Findlay v. Triggs' Adm'r, 83 Va. 539 (1887); the court adding, however, that if a legatee is paid in excess under mistake as to amount of assets, the administrator may be "substituted to the right of the creditor whom he has been compelled to pay."

TARPLEE v. CAPP.

25 Ind. App. 56.—1900.

Wiley, C. J.—This was an action by appellee, as administrator *de bonis non* of the estate of James W. Anderson, deceased, against appellant,[1] to recover an overpayment made to him by a former executor in the belief that the estate was solvent. The case was put at issue, tried by the court, a special finding of facts made, and conclusions of law stated thereon, favorable to appellee. Final judgment was rendered accordingly. * * * *

The first objection urged to the complaint is that the appellee, as administrator *de bonis non,* has no right to bring and maintain this action. While there is some conflict in the adjudicated cases, we are inclined to the view that the weight of the authorities and sound reason support appellee's right to maintain the action. In Thornton & Blackledge on Administration and Settlement of Estates, § 169, p. 453, the rule is stated to the effect that where an administrator pays to a creditor of the estate the full amount of his claim, believing the estate is solvent, and it turns out that it is insolvent, such administrator may recover back the excess in amount paid, if such claim is not a preferred one. In East v. Ferguson, 59 Ind. 169, it was held that, where a settlement was made with a creditor of an estate, and his claim allowed in full upon a mutual mistake, that the estate was solvent, and the claim is not a preferred one, such facts will constitute such a mistake as will be relieved against, and an action will lie to recover the excess. In Wolf v. Beaird, 123 Ill. 585, 15 N. E. 161, it was held that where an executor, under the honest belief that the estate was solvent, pays a creditor in excess of his *pro rata* distributive share, he may recover back the overpayment in an action for money had and received for the use of the estate. It was also held in that case that it could make no difference to the defendant whether the plaintiff sued in his representative capacity or in his individual name. It has been held that, where an administrator of a deceased member of a firm, relying upon statements contained in the reports and inventory of the surviving partner of his decedent, paid to one of the heirs and distributees of the estate represented by the administrator a sum in excess of the amount she was entitled to receive by reason of a depreciation in the value of the estate of the deceased partner, the administrator was entitled to recover from such heir and distributee the excess, whether the money was paid to her at her request or was voluntarily paid to her without request; the money having been paid under a mistake of fact, and not under a mistake of law. Stokes v. Goodykoontz, 126 Ind. 535, 26 N. E. 391. The court, by Elliott,

[1] A creditor of Anderson.—Ed.

J., said: "The money paid by the administrator was paid under a mistake of fact, and not under a mistake of law. The facts which induced the administrator to pay the money * * * * were presented to him in a lawful mode, and he had a right to rely upon them."

In Henry's Probate Law, § 333, it is said: "As a rule, an overpayment to a creditor, made by an administrator or an executor, may be recovered; it being inferred that he only intended to make such payment as the estate could afford, and not to subject himself to personal liability on account of a deficiency of assets. This is, however, contrary to the common-law rule. But it is probably essential to the recovery that such payment has been made under the impression that the estate was solvent." Smith v. Smith, 76 Ind. 236, is in point. In that case the executors paid to appellant, who was a legatee under the will of the decedent, a certain amount of money and specific property. No account had been taken of the claim of the widow to her statutory allowance of $500, and it turned out that, after the distribution to appellant (the residuary legatee), there was not left sufficient assets with which to pay the widow's claim for $500. Referring to the rule, and the authorities in support of it, that ordinarily the payment of a demand without compulsion, and without fraud, and with a full opportunity of obtaining such knowledge, cannot be recovered back, the court, by BICKNELL, C. C., said: "But such a rule is not applicable to legacies, or to money paid upon distribution by an executor. A legatee or distributee may be required to give a bond conditioned to refund his ratable proportion of the estate, if necessary (Decedents' Act, §§ 120, 140); and the failure of the executor to take out such a bond will not release the legatee or distributee from his liability to refund when necessary for the payment of debts, legacies, or claims." The following cases are also in point: Mansfield v. Lynch, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285; Walker v. Hill, 17 Mass. 380; Alexander v. Fisher, 18 Ala. 374; Rogers v. Weaver, 5 Ohio 536; Wheadon v. Olds, 20 Wend. 174; Barnett v. Van Meter, 7 Ind. App. 45, 33 N. E. 666.

It is also urged that the complaint is bad because it does not allege that a final dividend had been ascertained and declared by the court in which the estate was pending for settlement. We do not think this objection is well taken. It is alleged that all the assets of the estate had been reduced to cash; that there was in the hands of appellee $84,988.56 to be applied on the general debts; that the claims filed amounted to $110,952.99, and that the estate could only pay 77½ per cent. on the dollar on the general claims. It is also stated on this basis what the overpayment to appellant was.[1] These averments are sufficiently definite to obviate the objections to the complaint under consideration. We are satisfied from the authorities, and upon sound reason, that the complaint states a cause of action. * * * *[2]

[1] As to the competency of evidence of the insufficiency of the assets, see Woodruff v. Claflin, 198 N. Y. 470, 477-478 (1910).

[2] See also, accord, Mansfield v. Lynch, set out in note, ante, p. 289. As to payment under mistake of law, by an executor, see Hemphill v. Moody, post, p. 414.

7. PLAINTIFF NEGLIGENT AND DEFENDANT'S POSITION CHANGED.

WILSON v. BARKER.

50 ME. 447.—1862.

APPLETON, C. J.—The facts, upon which the rights of these parties depend, are few and not controverted.

On November 8, 1843, David Pingree and Eben S. Coe conveyed a tract of land in Stetson to E. G. Allen, who, on the same day, mortgaged the premises to his grantors to secure in part the purchase money. The deed and mortgage were duly recorded, and the latter was assigned to the defendant, September 19, 1854, and the assignment seasonably recorded.

E. G. Allen, having only the equity to redeem, on 16th of April, 1850, conveyed by deed the premises purchased to D. C. and C. L. Whiting, who, on the same day, conveyed them in mortgage to their grantor. The deed was not recorded, the mortgage was. On September 13, 1853, the deed, E. G. Allen to the Whitings, not having been recorded, Messrs. Shaw & Merrill caused an attachment to be made of Allen's right of redeeming his mortgage to Pingree and Coe. They subsequently, at the April term 1856, obtained judgment, and, on the 30th of the following May, this equity of redemption was seized, and, on 2d July, of the same year, at 2 o'clock P. M., the same was sold to the plaintiffs in the execution, in whom, or in their assigns, the title thus acquired became perfected by lapse of time. All these proceedings are conceded to have been in conformity with law. The mortgage of the Whitings, dated 16th April, 1850, after intermediate assignments, on 9th February, 1856, became vested in the plaintiff.

It thus appears that the plaintiff, to make his mortgage available and his title under it good, was bound to procure a discharge of the mortgage of Allen to Pingree and Coe, which had been assigned to the defendant, and to remove the attachment of Shaw & Merrill. In this state of the title, the plaintiff, on the 26th of July, 1856, at 1 o'clock, tendered the defendant $230 on account of the mortgage of Allen to Pingree and Coe, assigned to him, which he received. Subsequently, being doubtful whether the amount tendered was sufficient, on the 6th of September following, he tendered the further sum of $6, which the defendant took, remarking that he always made it a rule to take all the money offered him, and, on the 12th of the same September, discharged the mortgage of Allen to Pingree and Coe, upon the records of the county. By these proceedings the estate of the plaintiff was relieved from one of the outstanding incumbrances. The attachment, ripened into a title by sale on execution, was still subsisting and unpaid. The plaintiff neglecting to redeem that, and the title being perfected in the purchaser, he lost all benefit from his payment of the mortgage debt. The tender, effecting the object for which it was made, ultimately failed to be of

any benefit, by reason of the intervening title of Shaw & Merrill becoming vested in them.

The plaintiff brings assumpsit to recover the money tendered on account of the Pingree and Coe mortgage.

It seems the plaintiff was in fact ignorant of the attachment in favor of Shaw & Merrill, though the same was duly recorded. The defendant, who, as their attorney, procured it to be made, did not disclose its existence at the time the tender was made, nor since. As the attachment was recorded, its existence was ascertainable by all interested to inquire. The plaintiff having an interest to ascertain the facts, omitted to examine the records and thus learn them. His neglect to make those inquiries, which ordinary prudence would dictate, cannot give him any new rights nor enlarge those already existing. The defendant did not disclose the existence of an attachment. He was not aware of the plaintiff's ignorance of that fact. He could not reasonably anticipate negligence on the part of one so sagacious and vigilant as the plaintiff. The parties were dealing adversely. He could not assume that the records of the county were unknown. He was not bound to inform the plaintiff of their contents, certainly not, when no inquiries were made of him on the subject.

That the plaintiff derived no ultimate advantage from the tender is no fault of the defendant. It answered the purpose for which it was made. It effected a discharge of the Pingree and Coe mortgage. It was made for the purpose of discharging that mortgage. The defendant appropriated the tender as the plaintiff intended he should. The mortgage is discharged. The plaintiff cannot place the defendant in the position in which he stood before its discharge. The plaintiff, by tendering the amount due to Shaw & Merrill, or to their assignee, might have accomplished his object. He neglected it and must suffer. But all this gives him no right of action.

Neither can the plaintiff's ignorance, that the deed of Allen to the Whitings was not recorded, avail him. The fact was easily ascertainable, and if not known, it was his neglect that he did not ascertain it. The defendant could not presume that the plaintiff did not know the state of his own title. He was not bound to deduce it for him, nor to point out any defective links there might be therein.

The parties negotiated *ex adverso*. The defendant made no misrepresentations. The plaintiff failed to tender enough to remove all existing incumbrances. He mistook the facts, and neglecting to guard his rights with his usual vigilance, he must abide the result.

Plaintiff non-suit.[1]

[1] Accord, Fegan v. Great Northern Ry. Co., 9 N. Dak. 30 (1899), where plaintiff, an employe of defendant, was by the rules of the defendant, bound to know the facts and defendant has, subsequent to the payment, lost a right to indemnity; and see Hathaway v. Delaware Co., 185 N. Y. 368 (1906).

In Queensborough Gas Co. v. Schoncke, 76 Misc. (N. Y.) 190 (1912), plaintiff, by erroneous reading of its meter, charged defendants for only part of the electrical current actually used. Defendants paid in good faith the bills as presented and added this cost of the current to the prices charged to their customers. Held, an alteration of position that would bar further recovery by plaintiff.

8. DEFENDANT NEGLIGENT AND DEFENDANT'S POSITION CHANGED.

NEWALL AND ANOTHER v. TOMLINSON AND ANOTHER.

L. R. 6 C. P. 405.—1871.

ACTION for money had and received, money paid, interest, and money found due upon accounts stated. Plea, never indebted.

The facts were as follows: The plaintiffs and the defendants were respectively cotton brokers in Liverpool. In April, 1870, the plaintiffs bought of the defendants seventy-four bales of cotton ex *Glen Cora,* each acting for principals whose names were not disclosed, and, according to the usage of the cotton-market, each treating the others as principals in the transaction. Weight-lists of the cotton were in the ordinary course delivered to each party from the warehouse-keeper at Albert Dock; but a clerk of the defendants made a mistake of 100 cwt. in adding up the figures, and the consequence was that when the plaintiffs paid for the cotton they paid the defendants too much by 509*l* 15s. The mistake was not discovered until the 14th of December, when the plaintiffs demanded back that sum. The invoice for the cotton (which was delivered on the 22d of April) was headed as follows: "Messrs. Newall & Clayton, bought from W. D. Tomlinson & Co." etc.; and it was not until after the discovery of the mistake that the plaintiffs were informed (as the fact was) that Messrs. Dixon & Co. were the defendants' principals.

In the meantime the defendants, who had previously to the arrival of the cotton advanced very considerable sums to the shippers, Messrs. Dixon & Co., had allowed the sum in question in their account with them, and had subsequently gone on making further advances; and when Dixon & Co. ultimately suspended payment, the balance due from them to the defendants on account of these transactions exceeded 2000*l.* The defendants thereupon claimed to be entitled to shelter themselves under the rule of law which protects payments *bona fide* made by an agent to his principal, without notice; and at the trial it was submitted on their behalf, that, being known to the brokers, and being under advances to their principals, whether the plaintiffs knew that they were acting for principals or not, they (the defendants) were entitled and bound to hand over the money to their principals, or (which was the same thing) entitled to set it off against their advances, and having done so, were not liable to be called upon to refund it: and the cases of Holland v. Russell, 1 B. & S. 424, 30 L. J. Q. B. 308: in error, 4 B. & S. 14, 32 L. J. Q. B. 297, and Shand v. Grant, 15 C. B. N. S. 324, were cited.

The learned judge in his summing-up said that every agent for the sale of goods who has advanced money upon them and has them

in his possession, has a right to sell them as owner, unless there be a countermand of his authority; and he distinguished the cases cited, on the ground that in both of them the persons who dealt with the agent knew that they were dealing with one who represented an undisclosed principal; whereas here the defendants, though general brokers, acted in the particular case as principals, and he directed the jury to find for the plaintiffs, damages 509*l* 15s., reserving leave to the defendants to move to enter a verdict for them, or a non-suit, if the court should think the ruling wrong.

Quain, Q. C., moved accordingly.

BOVILL, C. J.—The defendants in the first instance personally claimed the price of the cotton from the plaintiffs as upon a sale to them by the defendants, each being, as between themselves, personally bound as principals in the transaction, though each were acting for principals whose names were not disclosed. The invoice was made out as upon a sale from the defendants to the plaintiffs, and claiming the price as being due to the defendants personally; and each were liable personally to the others for the due performance of the contract. The defendants were entitled to sue for and recover the price of the cotton in their own names, and to apply it when received to their own use and benefit. They had made large advances to their principals, Messrs. Dixon & Co., upon the security of the cotton, and were entitled to sell it to recoup themselves. In no sense could they be said to have received this money for the purpose of handing it over to Messrs. Dixon & Co.; nor did they in point of fact hand it over to them. It is true that the defendants were shown to have made further advances to Messrs. Dixon & Co. subsequently to the receipt by them of this money. That, however, could not make it money had and received by Messrs. Dixon & Co. to the use of the plaintiffs, so as to enable them to sue Messrs. Dixon & Co. for it. The mistake originated with the defendants themselves, and they alone are responsible. The cases relied on are clearly distinguishable. In Shand v. Grant, 15 C. B. N. S. 324, the defendant received the money as agent of the shipowner, and for the purpose of handing it over to him. The case was put entirely upon the ground that the defendant was a mere agent. He had handed over the money to his principal, and the principal was the proper person to sue. So, in Holland v. Russell, the same view was taken, and the decision proceeded upon the ground that the defendant was a mere agent. COCKBURN, C. J., in delivering the judgment of the court below, after stating what had been the contention on one side and on the other, says, 1 B. & S. 424, at p. 432, 30 L. J. Q. B. 308, at p. 312: "We are of opinion that the plaintiff fails upon the facts. Not only is it clear that the defendant was acting solely as agent, but (the court having power to draw inferences of fact) we are of opinion that the plaintiff was aware that the defendant was acting as agent for the foreign owners, and as such made to him the payment of the money he now seeks to recover back." And, when the case came before the court of error,

the same view was taken. ERLE, C. J., delivering the judgment of that court, says, 4 B. & S. 14, at p. 15, 32 L. J. Q. B. 297, at p. 298: "The defendant who received this money from the plaintiff received it as agent for a foreign principal. The plaintiff knew that, and paid him in that capacity, with the intention that he should pay it over to that principal, and he did so; and all the money thus received has been accounted for in a settlement of account approved by the foreign principal, under circumstances which clearly amount to payment of that sum to him. The defendant having therefore been altogether an agent in the matter, is there anything which takes him out of the ordinary protection to which an agent is entitled who pays money to his principal before he received notice not to pay it, and before he knew that there was no legal duty on him to do so? There is nothing in this case to deprive the defendant of the right of an ordinary agent so to protect himself." Here the defendants were not mere agents. They were dealing as principals, and entitled to apply the proceeds of the sale of the cotton to their own use. For these reasons I am of opinion that the direction of the learned judge was right, and that there should be no rule. [Concurring opinions by BYLES, MONTAGUE SMITH and BRETT, JJ.]

---

9. NECESSITY OF NOTICE TO, OR DEMAND UPON, DEFENDANT.

SHARKEY v. MANSFIELD.

90 N. Y. 227.—1882.

THIS action was brought to recover a balance alleged to be due for work and material in building a stone pier in the Gowanus canal.

Plaintiff claimed that the work, save some extra work, was to be done for a gross sum, and that no price was fixed for the extra work; defendant claimed the agreement to be that the work should be paid for at a specified price per cubic yard. He set up as a counter-claim an over-payment made through mistake on his part as to the quantity of the work done, which mistake was not discovered until a measurement was made after the suit was commenced, which was in 1878. Plaintiff proved that his bookkeeper presented to defendant a bill for the work as claimed by him in 1872, and that thereafter defendant made payments thereon.

FINCH, J.—This is not a case of money paid under a mutual mistake, where the action of each party was equally innocent. The mistake was that of the party who paid, and not at all that of the one

who received the amount in dispute. The plaintiff was employed by the defendant to build a stone pier in the Gowanus canal. The precise terms of the contract, and the amount due for construction were sharply litigated on the trial; but the verdict of the jury establishes that there was an over-payment mistakenly made by the defendant. His right to recover back is resisted, mainly upon the ground that notice was not given and demand made of the over-payment, before setting up the counter-claim. Without stopping to consider whether the same rule applies to a defendant pleading an over-payment by way of counter-claim, as that which governs a plaintiff suing for the same cause, and assuming the law to be identical in both cases, we are still of opinion that a demand was not a condition precedent to the defendant's right of action. Two cases in this court are relied upon by the appellant. The Mayor v. Erben, 3 Abb. App. Dec. 255; Southwick v. The First National Bank of Memphis, 84 N. Y. 420. In the first of these cases no mistake was established, and that fact decided the case. The court added, "where money is paid under *mutual* mistake," demand, or at least notice of the error, must precede a right of recovery. In the later case, the mistake was mutual, and stress was laid upon the fact that the defendant "lawfully and innocently received the draft and the money thereon." The ground of these decisions is quite obvious. Where the mistake is mutual, both parties are innocent, and neither is in the wrong. The party honestly receiving the money through a common mistake owes no duty to return it until at least informed of the error.[1] It is just that he should have an opportunity to correct the mistake, innocently committed on both sides, before being subjected to the risks and expenses of a litigation. It was said in Abbott v. Draper, 4 Den. 53, that "when a man has paid money as due upon contract to another, and there is no mistake, and no fraud or other wrong on the part of the receiver, there is no principle upon which it can be recovered back until after demand has been made." While this language is not accurate as to a mistake on the part of the receiver, if that was the meaning intended, the doctrine is clearly recognized that where the receiver is guilty of fraud or other wrong in taking the money, he is not entitled to notice. The necessity of a demand does not, therefore, exist in a case where the party receiving the money, instead of acting innocently and under an honest mistake, knows the whole truth, and consciously receives what does not belong to him, taking advantage of the mistake or oversight of the other party, and claiming to hold the money thus obtained as his own. In such case he cannot assume the attitude of bailee or trustee, for he holds the money as his own, and his duty to return it arises at the instant of the wrongful receipt of the overpayment. He is already in the wrong, and it needs no request to put him in that position. The Utica Bank v. Van Gieson, 18 Johns. 485; Andrews v. Artisans' Bank, 26 N. Y. 299; Dill v. Wareham, 7 Met. 447; Southwick v. First National Bank of Memphis, 84 N. Y. 430.

This case is of that character. The receiver was not innocent. If

[1] As to the time when the Statute of Limitations begins to run in New York, see Wyckoff v. Curtis, 7 Misc. (N. Y.) 444, 446 (1894).

he did not perpetrate a fraud, at least he committed a wrong. He knew all the facts and must be assumed to have known the law. He went to trial not admitting a mistake, but insisting that there was none. He charged a price beyond that to which he was entitled, or for quantities which were exaggerated, and obtained the money through the inadvertence and mistake of his debtor, who had not measured the work. He did not come rightfully by the excess. He took it as his own money, conscious of all the facts, and not only claimed to hold it as such, but sued to recover more. The case is not one in which he owed no duty until apprised of his mistake, for he made none. He took what was not his, knowing all the facts, and at the moment of its receipt it was his duty to return it. The action for money had and received could be at once maintained.

The appellant further relies upon the facts of the presentation of his bill and a payment thereafter, made by the defendant, and also upon the lapse of time during which the bill remained unchallenged. These circumstances he insists amounted to an admission of the correctness of the bill. They tended to that result, but were not conclusive. They were met by the defendant's evidence of mistake and his explanation consistently therewith. The facts relied on and the explanation given were submitted to the jury and they have determined the question. We discover no just ground for reversing the recovery.

The judgment should be affirmed, with costs.

All concur, except TRACY, J., taking no part.

Judgment affirmed.[1]

[1] In Gillett v. Brewster, 62 Vt. 312, 313 (1890), the court says: "That the payment was expressed to be 'on account,' and not in final settlement, can make no difference with the rights of the parties, but serves only as evidence of the mistake or negligence of the party making the overpayment, in supposing that he was only paying on account, when in reality he was paying a larger sum than the whole amount actually due. Nor can it affect their rights that the amount of such payment was, at the time of suit brought, unascertained. No formal demand or of any specific sum is necessary. 'Whatever language gives him (the defendant) notice of the overpayment, and calls upon him to rectify the mistake, is sufficient.' 'The money all the time is the property of the party making the overpayment, but having come into the possession of the other party without his fault or knowledge, he is entitled to be notified of the fact that he has the money in his possession, and to be called upon to rectify the mistake, before he is subject to a suit for the recovery.' Bishop v. Brown, *supra* [51 Vt. 330]."

RECOVERY OF INTEREST ON MONEY PAID UNDER MISTAKE OF FACT.—"The court included in the amount for which judgment was directed the interest on each overpayment from the time when such overpayment was made. This, the plaintiffs claim, was incorrect, and that interest was only allowable from the time of the service of the answer, which, for the purpose of interest, might be deemed the date of the demand. This question the plaintiffs are in a position to raise under their exception to the conclusion of law that the defendant was entitled to judgment in the sum of $302.13. There was here a mutual mistake, and no fraud can be imputed to either party. In such a case, interest should not be allowed except from the time when the demand was made. King v. Diehl, 9 Serg. & R. 409; Ashurst v. Field, 28 N. J. Eq. 315;

GRAY, J., IN LEATHER MANUFACTURERS' BANK v. MERCHANTS' BANK.

128 U. S. 26, 35.—1888.

WHENEVER money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment, and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run, immediately upon the payment.

Thus, in the early case of Bree v. Holbech, 2 Doug. 654, where an administrator received the amount of the mortgage money upon his assignment of a mortgage purporting to be made to the deceased, but in fact a forgery, of which both parties were ignorant, it was held by Lord MANSFIELD and the court of the king's bench that the right of action to recover back from the administrator the money so paid was barred by the statute of limitations in six years from the time of the payment. So, in Utica Bank v. Van Gieson, 18 Johns. 485, where a promissory note payable at the Bank of Geneva was left by the indorsers with the Utica Bank for collection, and sent by it to the Bank of Geneva for that purpose, and the amount was afterward paid by the Utica Bank to the indorsers upon the mistaken supposition that it had been paid to the Bank of Geneva by the maker, when in fact it had not, and it was not pretended that the Utica Bank had been guilty of any negligence, the supreme court of New York held that notice of the fact that the note had not been paid by the maker was unnecessary to maintain an action by the Utica Bank to recover back the money from the indorsers; and Chief Justice SPENCER said: "The plaintiffs' ground of action, then, is that the money was paid to the defendants under a mistake of facts. The defendants are not bailees or trustees of the money thus received. It was paid and received, as their money, and not as money to be kept for the plaintiffs. In such a case, it was not necessary to make a demand prior to the suit; for a request was not essential to the maintenance of the action; nor did the defendants' duty to return the money erroneously paid arise upon request."

In Bank of United States v. Daniel, the acceptor and indorsers, upon taking up a bill of exchange for $10,000, which had been duly protested for non-payment, paid ten per cent. as damages, under a mistake as to the local law upon the subject. Upon a bill in equity to

1 Amer. Lead. Cas. (2d Ed.) 528; 11 Amer. & Eng. Enc. Law 398."—Leach v. Vining, 18 N. Y. Supp. 822, 824 (Supreme Ct. Gen. Term 1892).

relieve against the mistake and recover back the money, this court, while holding that such a mistake gave no ground for relief, also held that, if it did, the statute of limitations ran, in equity as well as at law, from the time of the payment, saying: "If the thousand dollars claimed as damages were paid to the bank at the time the bill of exchange was taken up, then the cause of action to recover the money (had it been well founded) accrued at the time the mistaken payment was made, which could have been rectified in equity, or the money recovered back by a suit at law." 12 Pet. 32, 56. In Dill v. Wareham, 7 Met. 438, the Supreme Judicial Court of Massachusetts, speaking by Chief Justice SHAW, held that a party receiving money in advance, on a contract which he had no authority to make and afterward refused to fulfil, was liable to the other party in an action for money had and received, without averment or proof of any previous demand. And in Sturgis v. Preston, 134 Mass. 372, where land was sold for a certain sum by the square foot, and the purchaser, relying on the vendor's statement of the number of feet, made payment accordingly, and afterward discovered that the number had been overstated, but disclaimed all charge of fraud or fraudulent concealment on the part of the vendor, it was held that the right of action to recover back the excess paid accrued immediately, without any previous demand, and was barred by the statute of limitations in six years from the date of the payment. See also Earle v. Bickford, 6 Allen 549; Blethen v. Lovering, 58 Maine 437.

The judgment of the circuit court in the present case appears to have been based upon the decision in Merchants' Bank v. First National Bank, 4 Hughes 1, which proceeds upon grounds inconsistent with the principles and authorities above stated, and cites no case except the very peculiar one of Cowper v. Godmond, 9 Bing. 748; s. c. 3 Moore & Scott 219, in which the right of action to recover back money paid for a grant of an annuity, the memorial of which was defective, was held not to accrue until the grantor elected to avoid it on that ground, the annuity apparently being considered as not absolutely void, but as voidable only at the election of the grantor. See Churchill v. Bertrand, 3 Q. B. 568; s. c. 2 Gale & Dav. 548. Although some of the opinions of the court of appeals of New York, in the cases cited at the bar, contain *dicta* which, taken by themselves, and without regard to the facts before the court, might seem to support the position of the defendant in error, yet the judgments in those cases, upon full examination, appear to be quite in accord with the views which we have expressed. The cases of Thompson v. Bank of British North America, 82 N. Y. 1, and Bank of British North America v. Merchants' Bank, 91 N. Y. 106, were actions by depositors against their respective bankers, and were therefore held not to be barred until six years after demand. In Southwick v. First National Bank, 84 N. Y. 420, the decision was that there was no such mistake as entitled the party paying the money to reclaim it; and in Sharkey v. Mansfield, 90 N. Y. 227, it was adjudged that money paid by mistake, but received with full

knowledge of all the facts, might be recovered back without previous demand; and what was said in either opinion as to the necessity of a demand where both parties act under a mistake was *obiter dictum.*

Two other cases in that court were decided together, and on the same day as Bank of British North America v. Merchants' Bank, above cited. In one of them, the defendants, who had innocently sold to the plaintiffs a forged note as genuine, and upon being informed of the forgery and requested to pay back the purchase money, had expressly promised to do so if the plaintiffs should be obliged to pay a third person to whom they had in turn sold the note, were therefore held not to be discharged from their liability to refund by the plaintiffs' having awaited the determination of a suit by that person against themselves, before returning the note to the defendants. Frank v. Lanier, 91 N. Y. 112. In the other case, a bank, which had paid a check upon a forged indorsement, supposed by both parties to be genuine, was held entitled to recover back the money, with interest from the time of payment, necessarily implying that the right of action accrued at that time. Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74.

In the case at bar, as in the case last cited, the plaintiff's right of action did not depend upon any express promise by the defendant after the discovery of the mistake, or upon any demand by the plaintiff upon the defendant, or by the depositor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to the plaintiff's use. That right accrued at the date of the payment, and was barred by the statute of limitations in six years from that date. For this reason, without considering any other ground of defense, the order must be

Judgment reversed, and case remanded to circuit court, with directions to set aside the verdict and order a new trial.[1]

[1] In Freeman v. Jeffries, L. R. 4 Exch. 189, 200 (1869), BRAMWELL, B. says: "Put the claim of this action, which is in the technical form of an action for money had and received, in a rational way, and it amounts to this. The plaintiff says, 'I, in the belief that a certain valuation had been made, paid certain moneys to you; I have since found that the valuation was not made, I therefore say there is a duty on your part to repay me.' Would the duty of repayment arise until this notice was given? I apprehend not; for at what other time could it have arisen? Not at the moment when the money was paid; for it was paid with the intention that the defendant should keep it. Was it, then, at the moment when the mistake was discovered? This would be most unjust; the mistake was the plaintiff's, and the discovery is the plaintiff's, and the defendant may still think that everything is right, and that no mistake at all was committed. Therefore until notice, no duty would arise, and therefore no cause of action." In Baker v. Courage, [1910] 1 K. B. 56, 66, this statement, in application, is limited to cases where the payee only, and not the payor, is mistaken; where the mistake is mutual, no notice and demand are necessary and the cause of action is complete upon payment.

ii. *Particular Applications.*

1. GRATUITY CONFERRED UNDER MISTAKE.

URIE v. JOHNSTON.

3 P. & W. (PA.) 212.—1831.

SAMPSON JOHNSTON, the plaintiff below, brought *indebitatus assumpsit* for work, labor and services against Urie, and recovered a verdict for $370.

KENNEDY, J.—The defendant in error is a negro, and the son of a negro woman, who was born and regularly registered a Pennsylvania servant until the age of twenty-eight years; and she was the daughter of a regularly registered Pennsylvania slave for life. The defendant in error was born on the 8th of July, 1800, during the servitude of his mother, and registered by her master in eight days after his birth. He was held and considered as a servant under the abolition act of the 1st of March, 1780, and as such had been transferred and sold, two or three times, and in the last instance, on the 16th of September, 1816, to the plaintiff in error, for the price of $550. He was held by the plaintiff in error, as a servant, without any opposition, or doubt, or question being made or entertained of his being legitimately so, until the 27th of July, 1829, when he was discharged from the service of the plaintiff in error upon a writ of *habeas corpus*. This was shortly after the supreme court in this state had decided in the case of Miller v. Dwilling[1] that the child of one bound to serve to the age of twenty-eight years was not bound to servitude for the same period, but was absolutely free. Until this decision a directly opposite opinion was entertained and prevailed not only with a great portion of the community, but with many of the most distinguished lawyers of the state. In confirmation of this I refer to the case of Stiles v. Nelly, 10 Serg. & Rawle 366. Although it appeared upon the face of the record, in the statement of that case, that Nelly was the child of one bound under the act of the 1st of March to servitude until twenty-eight only, it never occurred to her counsel to claim her freedom upon that ground, nor yet to any one of the learned judges of the court, whose duty it certainly was, if not in *favorem vitae,* in favor of liberty—a right much more highly estimated by many—to have pronounced her free for that cause if they had thought so, although it was not mentioned or contended for by her counsel. I have no doubt she would have been so declared at the time had the same opinion been entertained by the judges of the supreme court then as at the time of the decision in Miller v. Dwilling. Indeed, I know that the minds of some of our most distinguished jurists in the state vacillated on this question. And although the language of the act of assembly

[1] 14 Serg. & R. (Pa.) 442.

was at all times the same, and underwent no change, yet I think it may be said that it was doubtful what its construction would be until it was judicially declared. In short, that it was doubtful what the law was on this point until this court determined it.

Considering this state of uncertainty as to what the law was when the plaintiff in error bought the defendant as a servant until twenty-eight, at the extravagant price of $550, which he paid for him, it cannot be presumed that the plaintiff doubted that the defendant in error was a servant until twenty-eight. It must be presumed that the defendant in error knew his genealogy, at least as well if not better than the plaintiff in error, and even after he attained the age of twenty-one he continued to live with the plaintiff in error as his servant, without any the least objection, until he was twenty-seven years of age. During all this time, at least, it may be said that the defendant in error was as much bound to know his condition and rights as the plaintiff. He might certainly waive or forbear to assert them as long as he pleased. It does not appear that the plaintiff ever endeavored or attempted to use any unfair means in order to prevent the defendant in error from claiming and obtaining his liberty if he chose. The counsel for the defendant in error has contended that his claim may be likened to the case of money paid through mistake, which may be recovered back, as he alleges; that the defendant in error performed the services for the plaintiff as his servant under a mistake of his real condition, not knowing that he was a freeman, and that the plaintiff in error, being greatly benefited by his services, is bound by the ties of natural justice and equity to remunerate him. It is true that assumpsit will lie for money had and received in all cases where by the ties of natural justice and equity the defendant ought to refund the money paid to him, except when he may with a good conscience receive it, and there was no deceit or unfair practice in obtaining it, in which case, although the money could not be recovered by law, the action will not lie to enable the party who paid it voluntarily to recover it back again. Morris v. Turin, 1 Dall. 148; Bogart v. Nevins, 6 Serg. & Rawle 369; Irvine v. Hanlin, 10 Serg. & Rawle 219. Let the matter, then, be tested by this rule, and the question will be, did the plaintiff in error, under the circumstances of this case, receive the labor and services of the defendant in error with a good conscience, in payment or satisfaction of the $550 which he had advanced for him? It must be admitted that the plaintiff in error was entitled to have either the services of the defendant in error or to have his money repaid; that he had a just and conscientious claim to the one or the other; if so, surely he might very fairly and honestly receive his money or the services in satisfaction of it from the defendant in error, or any other who was willing to pay or perform service for it. In such a case it is not sufficient, as has been contended, to affect the conscience of the plaintiff in error that the services, though performed willingly by the defendant in error, were performed under mistake; because, in the case of a sheriff paying, through mistake, money made by him to a plaintiff in a junior execution when he

ought to have paid it on a senior, he cannot recover it back, although by doing so he made himself liable to the plaintiff in the senior execution to pay again to him. The mistake of the sheriff in this case has never been held to affect the conscience of the junior execution creditor, who had no right to demand the money. The amount of his execution was justly due to him, and he might therefore fairly receive it of the sheriff, or of any other person who was willing to pay it to him. It was the business of the sheriff to know what his duty was, and if he mistook it, he must be the sufferer. This is certainly a much harder case than the one now before the court. In the case of the sheriff, he is clearly the loser to the whole amount of the money paid by him, but in the case under consideration the defendant was supported and maintained entirely at the expense of the plaintiff in error, who furnished him with boarding, lodging and clothing, as also every other necessary of life. If he would have made more than this for himself had he put in the same time under the idea that he was free and his own master may be doubtful; at least it is not certain that he has actually sustained any loss.

The defendant in error was at least bound in gratitude to make compensation for the care, attention and expense bestowed and incurred in raising and instructing him from his birth until he became able to take care of and provide for himself. And as his counsel allege that he is a man of considerable merit, it may be presumed that he owes this in part to his good education and the careful manner in which he was brought up. For all this he stood indebted to the plaintiff in error, who has either paid for, or furnished it himself. Besides, it may be observed that if the defendant in error had been abandoned by the master of his mother in his earliest stage of infancy, he would perhaps have fallen into the hands of the overseers of the poor of the township in which he was born, and I am inclined to think that they, under the fourth section of the abolition act of the 1st of March, 1781, might have bound him out as an apprentice until he would have arrived at the age of twenty-eight years; this they were clearly authorized to do in certain cases; so that the lot of the defendant in error may have been better than otherwise it would, had he been given up shortly after his birth by the master of his mother; for certainly he was not bound to maintain him beyond his pleasure, and if he did so he ran the risk of getting nothing for it.

Upon the principle that is contended for, this action ought to be supported by every apprentice that is bound by an informal or void indenture. After he has served out his apprenticeship, he might turn round and sue his master for his services. So Nelly, who served Mr. Stiles in the case already cited, might sustain a suit against him for her services, notwithstanding she was adjudged by the decision of the supreme court to be his servant, because, according to the last decision on her condition, in the case of Miller v. Dwilling, she was free. Now, such suits and claims have never been thought of, and I have no hesitation in saying that they cannot be supported.

The case of negro Peter v. Steele, 3 Yeates 250, which has been cited and relied on by the counsel for the defendant in error, does not bear upon the merits of this case; it decides nothing more than that the merits, if the plaintiff has any, may be tried in an action of assumpsit, which I think is perfectly correct. Again, it has been said that in actions *de homine replegiando,* brought by those who have been held as slaves or servants, in which recoveries have been had, that damages have been uniformly given and allowed; this is true, and in every such case damages follow a recovery, of course; but then they may be nominal only, and certainly ought to be no more in a case where the defendant in the action *de homine replegiando* had the same ground for claiming and accepting of the service of the plaintiff that the plaintiff in error had to the service of the defendant in error in this case. If the holding the plaintiff in the action *de homine replegiando* be decided to be unlawful some damages must be given for that, at least nominal, but they are not necessarily given upon the ground of compensating for services, for the action or issue joined in it does not involve that question.

It is not pretended that there was any express contract in this case between the parties upon which the plaintiff below can sustain his claim against the defendant. As to an implied assumpsit, I think that none can be raised. The defendant below might have conscientiously received the services of the plaintiff until he attained the age of twenty-eight years if he had continued to render them, and would have had a right to consider and apply them towards the satisfaction of the money which he paid for him. Suppose Johnston had continued to serve Urie until he was twenty-eight, and Urie had brought a suit against his vendor of Johnston's servitude to recover the $550, would not Johnston's having served out the whole term for which he was sold have been a bar to the action? Most certainly it would. See Nickerson v. Howard, 19 John. Rep. 113. Although Johnston was not bound by law and could not have been compelled to serve Urie, and in that way satisfy him for the money which he had paid, and was entitled to be compensated for in some way, yet, having done so, he cannot claim now to have his character changed into a hireling and be paid for his labor contrary to the understanding that existed between them during the whole time of such labor or service.

The judgment of the court below is reversed.[1]

[1] In Alfred v. Marquis of Fitzjames, 3 Esp. 3, a servant, who had been a slave in the West Indies, came to England and continued in his master's service there, without agreement as to wages. He was not allowed to recover in assumpsit for wages, as "there was no original contract of service for wages." See also Burrows v. Ward, 15 R. I. 346 (1886).

In Hickam v. Hickam, 46 Mo. App. 496 (1891), the plaintiff, who was an ignorant negro woman, had, after the emancipation of slaves in Missouri, been induced, by her former master's false and fraudulent representations, to render services under the supposed continuance of the status of a slave, and it was held she could recover.

OSBORN v. THE GOVERNORS OF GUY'S HOSPITAL.

2 STRANGE 728.—1727.

THE plaintiff brought a *quantum meruit pro opere et labore* in transacting Mr. Guy's stock affairs in the year 1720. It appeared he was no broker, but a friend; and it looked strongly as if he did not expect to be paid, but to be considered for it in his will. And the chief justice directed the jury that, if that was the case, they could not find for the plaintiff, though nothing was given him by the will; for they should consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy cannot afterwards resort to his action.[1]

ST. JOSEPH'S ORPHAN SOCIETY v. WOLPERT.

80 KY. 86.—1882.

JUDGE HARGIS.—The appellant, a charitable institution for the rearing, maintaining and educating of orphan children, brought this action against John Schulten, as guardian of Frank, George, Cath-

[1] Accord, Sheperd v. Young, adm'r, 8 Gray 152 (1857), where one who had supported her destitute grandchild was not allowed, after the death of the child in a railroad accident and the recovery of damages by the administrator, to recover from the latter the amount of the child's board.

But *in re* Clabbon, [1904] 2 Ch. 465, the guardians of the poor had supplied necessaries to an infant who afterward became entitled to a legacy. The court said: "I cannot agree that a pauper who takes relief in the shape of necessaries which keep him alive, takes that relief so entirely of right, that he is not under a legal liability to pay if he afterwards comes into money." Accord, Birkenhead Union v. Brookes, 95 L. T. 359 (1906).

In Trainer v. Trumbull, 141 Mass. 527 (1886), recovery was allowed for necessaries supplied to an infant pauper, who at the time they were supplied, had an expectation of $10,000, and who was supplied "on the credit of his expectations."

erine and John Wolpert, and against each of said infants in their individual capacity, for the value of raising, taking care of and educating them.

The petition, stripped of its formal parts, substantially alleges that the infants named were supposed by appellant and their guardian to be penniless, and that the appellant received, cared for and educated them as persons who have no property or means, and that such persons were so received and cared for without charge in the institution; but that the by-laws authorized by its charter provide that the guardian of orphans who have property, means or estate might contract with appellant's board of trustees, and agree upon the conditions of their admission; and that appellant has recently discovered that the infant appellees did have some money, which was received from their mother's estate, and as a pension, by reason of the military service of their father in the United States army. * * *

After the appellant, under protest, elected to prosecute its action against the guardian of John Wolpert, the latter demurred, and the court sustained the demurrer, and that ruling forms the next question to be determined.

It will be noticed that the appellant does not allege any promise or agreement with the guardian of the infants, either for board, care or education, and having, from charitable motives, taken, raised and educated them without intending to charge therefor, as it alleges, it cannot, by reason of this express and executed gratuity, recover on an implied assumpsit raised by law, unless the alleged mistake in the condition of these orphans will authorize a revocation of its consent, and impose upon them a liability for what it voluntarily did. It is not alleged that the guardian intentionally or fraudulently suppressed the knowledge from appellant of the existence of the small sum which they received by distribution from their mother's estate or of the pension; and a close analysis of the whole case presents the question whether a charitable institution, incorporated for the purpose, shall be permitted to receive, care for and educate orphans, with the express understanding that nothing is to be charged therefor, and when it is discovered that such orphans have received, by the misfortunes of war and the charity of the government, a pension for the purpose of subsistence, which is exempt from attachment, levy or seizure, revoke its gratuity and share with the beneficiaries that charity which they have received from another source. We do not think it can be allowed this privilege of recantation, because its charter and by-laws authorized it to contract for compensation; yet it failed to arm itself with an agreement therefor, and no deception is alleged to have been practiced to prevent this exaction.

And it has been held too often to admit of doubt or discussion that an executed gift or gratuity cannot be revoked by the donor, no matter what may have been the condition of the donee, or what charities he shall receive, or property acquire in the future, unless the donation or gratuity were the result of fraud or mistake in its execution. And there is no reason why an executed gift of personal

on Contracts, 9, 10; 1 Chitty on Contracts, 87; Earle v. Coburn, 130 Mass. 596; Milford v. Commonwealth, 144 Mass. 64.

But the objection to maintaining the plaintiff's action lies deeper. The work and labor never constituted a cause of action in tort. The plaintiff could have maintained no action of tort against the intestate for withholding payment for the work and labor in housekeeping, or for, by false representations, inducing her to perform the work without pay. The particular acts which she performed as a wife were not induced by the deceit, so that each would constitute a substantive cause of action, but by the position which she was deceived into assuming, and would be elements of damage in an action for that deceit. Labor in housekeeping was a small incident to a great wrong, and the intestate owed no duty and had no right to single that out and offer payment for it alone; and the offer to do so might well have been deemed an aggravation of the injury to the plaintiff.

We have been referred to Higgins v. Breen, 9 Mo. 493, and Fox v. Dawson, 8 Martin 94, as decisions contrary to the conclusion which we have reached. It does not appear upon what ground the latter case was decided. The former was decided in favor of the defendant, the administrator, upon technical grounds, but the question of his liability was considered. It was assumed that an action of contract could have been maintained against the intestate for work and labor, and the question discussed was whether the action would survive against his administrator, and it was held that it would. Upon the evidence in the present case we think that no action, certainly no action of contract, for the cause of action declared on, could have been maintained against the intestate. Even if the intestate had been liable in tort, we are not prepared to assent to the proposition that an action of contract will lie against an administrator for a tort of his intestate for which no action of contract could have been sustained against him.

In the opinion of a majority of the court, the entry must be:

Exceptions overruled.[1]

---

2. MISTAKE AS TO THE EXISTENCE OF A CONTRACT.

VAN DEUSEN ET AL. v. BLUM ET AL.

18 Pick. (Mass.) 229.—1836.

This was an action of debt. The declaration contained two counts upon a special contract under seal, a third upon a *quantum meruit* for labor performed, and a fourth upon a *quantum valebant* for materials furnished. The defendant Blum was defaulted; the other defendant, Thouvenin, appeared, and to the first two counts he pleaded *non est factum*, and to the third and fourth, *nil debet*.

[1] Accord, Payne's Appeal, 65 Conn. 397 (1895). Contra, Sanders v. Ragan, (N. Car.) 90 S. E. 777 (1916); note, 2 Cornell Law Quar. 236.

At the trial, before MORTON, J., the plaintiffs produced the contract, purporting to be between themselves of the one part, and Blum and Thouvenin of the other part. Blum and Thouvenin were partners, and were so described in the contract. The plaintiffs had duly executed the contract, and Blum also had executed it by signing the company name "J. C. Thouvenin & Co.," and annexing a seal. There was no evidence that he had any authority to execute the contract in behalf of Thouvenin, or that Thouvenin was present at the execution or ever ratified it. The judge ruled that the instrument could not go in evidence to the jury as the deed of Thouvenin.

The contract was for building a dam by the plaintiffs for Blum and Thouvenin across the Housatonic river, which was a purpose within the scope of the partnership business. The plaintiffs offered to prove that they built the dam and furnished the materials therefor, and they claimed against Thouvenin, under the third and fourth counts, what their work and materials were worth. Thouvenin objected to the admission of this evidence, and contended that, there being an express contract executed by the plaintiffs and Blum, and that contract being in force and binding upon Blum, the plaintiffs' remedy was on that instrument alone. But the judge ruled that the plaintiffs might, notwithstanding that contract, recover under the third and fourth counts, upon an implied promise, for all the materials furnished and labor performed before the dissolution of the partnership.

Thouvenin and Blum dissolved partnership on the 10th of November, 1832, and all the partnership property was conveyed to Blum, and he agreed to pay all the partnership debts. The dam was not finished until after the 10th of November, and for the work done previously to that day the jury found a verdict against Thouvenin.

The questions arising upon these facts were reserved for the consideration of the whole court.

MORTON, J., delivered the opinion of the court.—Debt, as well as assumpsit, will lie on a *quantum meruit* or a *quantum valebant*. 1 Chit. Pl. 107; 2 Wms's Saund. 117b, note; Union Cotton Manufactory v. Lobdell, 13 Johns 462. Hence these counts may well be joined with counts upon a specialty. Smith v. First Congr. Meetinghouse in Lowell, 8 Pick. 178.

It was long doubted whether a man who performed work in consequence of a special contract, but not in conformity to it, could recover for the services rendered and materials found. There are many and conflicting authorities on the subject. They have all been carefully examined and compared, and the rule established by our court, as we think, according to the principles of justice and the weight of authority. He who gains the labor and acquires the property of another must make reasonable compensation for the same. Hayward v. Leonard, 7 Pick. 181; Smith v. First Congr. Meetinghouse in Lowell, 8 Pick. 178; Munroe v. Perkins, 9 Pick. 298; Brewer v. Tyringham, 12 Pick. 547.

The general authority derived from the relation of partnership

does not empower one partner to seal for the company or to bind them by deed. It requires special power for this purpose. See Cady v. Shepherd, 11 Pick. 400, and the cases there cited. Here was no evidence of any previous authority or subsequent ratification. The sealed instrument executed by one partner in the name of the firm might bind him, but could not be obligatory upon the company. And although the plaintiffs might have had a remedy upon the contract against the party who executed it, yet they were not bound to rely upon him alone.

The services never were rendered either in conformity to or under such an agreement. The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as these benefited the company, the plaintiffs are entitled to recover against them.

Judgment on the verdict.[1]

TURNER & OTIS v. WEBSTER.

24 KAN. 38.—1880.

ACTION brought by Webster against Turner and another, partners, to recover for services rendered the defendants. Verdict and judgment for plaintiff. The defendants bring the case to this court. The facts are stated in the opinion.

BREWER, J.—In an action commenced by plaintiffs in error, an attachment was issued, placed in the hands of the sheriff, and by him levied upon certain mill property. Pending the attachment proceedings, the sheriff, under direction of plaintiffs in error, employed defendant in error to watch the property; and this action was brought by defendant in error, plaintiff below, to recover for such services. That the sheriff was authorized by plaintiffs in error to employ defendant in error, and that the latter performed the services, are conceded facts. The dispute is as to the compensation. Webster claims that the contract price was three dollars per day, and that it was worth that amount, while Turner & Otis say that they authorized the sheriff to contract for only one dollar and a half a day, and the sheriff says that that was all he promised to pay. The misunderstanding seems to have arisen in this way: After the attachment, Turner & Otis requested the sheriff to find some one to guard the mill. Meeting Webster, he asked him what he would undertake the job for. He replied, one dollar and a half a day, and nights the same. The sheriff understood him to say and mean one dollar and a half for each day of twenty-four hours, while plaintiff meant that amount for a

[1] Contra, Bond v. Aitkin, 6 Watts & S. 165 (1843), holding that the only action is on the sealed instrument against the partner who executed it.

day of twelve hours, and the same for the night time, or three dollars for every twenty-four hours. The sheriff reported the offer to Turner & Otis as he understood it, and they, after some hesitation, told him to accept the offer and employ Webster. Without further words as to the price, the sheriff gave the key of the mill to Webster and told him to go ahead. Now, the contention of plaintiffs in error is that the case turns on the law of agency; that they never personally employed Webster; that the sheriff was only a special agent with limited powers, only authorized to bind them by a contract to the amount of one dollar and fifty cents per day of twenty-four hours; that Webster is chargeable with notice of the extent of the sheriff's authority, and can enforce the contract as against the plaintiffs in error to the extent only of such authority. For any contract beyond that amount, the special agent binds himself alone, and not the principal. On the other hand, the defendant in error contends that where services are contracted for and rendered, and no price stipulated, the law awards reasonable compensation therefor, and that where there is a misunderstanding as to the price, the one party understanding it at one sum and the other at a different, there is no stipulation as to the price, and that it makes no difference whether the contract be made through an agent or with the principal directly. In the case at bar he contends that it is immaterial that the conversation and misunderstanding were with the sheriff, the agent, and that the rule is just the same as though the talk and misunderstanding had been with Turner & Otis personally.

We think the case rests upon the propositions advanced by the defendant in error. It will not be questioned that, where the minds of two contracting parties do not come together upon the matter of price or compensation, but do upon all other matters of the contract, and the contract is thereupon performed, the law awards a reasonable price or compensation. Thus, where shingles were sold and delivered at $3.25, but there was a dispute as to whether the $3.25 was for a bunch or for a thousand, it was ruled that unless both parties had understandingly assented to one of those views there was no special contract as to price. Greene v. Bateman, 2 Woodb. & M. 239. It is said by Parsons, in his work on Contracts, Vol. 1, p. 389, that "there is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense." Here, Webster never assented to a contract to work for $1.50 a day. He agreed to do a certain work, and did it; but his understanding was that he was to receive $3 per day. Turner & Otis employed him to do that work, and knew that he did it; but their understanding was that they were to pay but $1.50 a day. In other words, the minds of the parties met upon everything but the compensation. As to that there was no *aggregatio mentium*. What, then, should result? Should he receive nothing, because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an

equal wrong to him. The law, discarding both, says a reasonable compensation must be paid. So that if the negotiation had been between the parties directly, and this misunderstanding had arisen, the rule of reasonable compensation would unquestionably have obtained.

Now, how does the law of agency interfere? The proposition of law advanced by counsel for plaintiff in error, that a special agent binds his principal to the extent only of the authority given, and himself by any promise in excess, is clear. But the agent made no promise in excess of his authority. He promised that which he was authorized to promise. Because the other party misunderstood the extent of the promise is surely no reason for holding the agent bound for more than he did in fact promise. The agent has rights as well as the principal. The work is not done for his benefit. He has discharged his agency in good faith and to the best of his ability. Why should he be mulcted in any sum on account of the misunderstanding of the party with whom he contracted? If compensation were given on the basis of his promise, then, if his promise was in excess of his authority, he should be responsible for the excess; but where the promise is ignored, and compensation given on the basis of value alone, he should not be charged with the excess of such value above his authority. An agent is responsible for good faith. That is not questioned. He does not insure, either to his principal or the opposite party. Acting in good faith and to the best of his ability, we can see no reason for making him responsible for any mere misunderstanding. Justice is done to all parties by ignoring any promise or understanding as to compensation and giving to the laborer reasonable compensation for the work done, and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor.

The case was submitted to the jury upon this basis, and while the instruction asked by plaintiffs in error and refused was unquestionably good law in the abstract, and while some criticism might fairly be placed upon one of the instructions given, and upon the answers of the jury to two special questions, we think the main question was fairly presented, and that no error appears justifying a reversal of the judgment, and it will be affirmed.

All the justices concurring.[1]

[1] Accord, Collins v. Stove Co., 63 Conn. 356 (1893); Russell v. Clough, 71 N. H. 177 (1901); McDonald v. Lynch, 59 Mo. 350 (1875); De Wolff v. Howe, 112 N. Y. App. Div. 104 (1906); Vickery v. Ritchie, 202 Mass. 247 (1909). As to whether the measure of recovery should be the value of plaintiff's labor and materials or the enhanced value of defendant's estate, see 23 Har. L. Rev. 150.

Quasi-Contractual Liability of a Corporation for Benefits Received Under a Promoter's Contract. Such a contract can not be technically ratified, but may be adopted through a new contract by the corporation when it comes into existence. Where, however, the evidence of an adoption is insufficient, and benefits have been received by the corporation, quasi-contract is one of the theories upon which recovery has been allowed against the corporation in some American cases. Low v. R. R., 45 N. H. 370 (1864); Farmers' Bank v. Smith, 105 Ky. 816 (1899); Taussig v. R. R., 166 Mo. 28, 38 (1901); Little Rock R. R. v. Perry, 37 Ark. 164, 191 (1881). See further, Machen on Corporations, vol. i, §§ 338-340.

COLE AND OTHERS v. CLARK.

3 PINN. (WIS.) 303.—1851.

HUBBELL, C. J.—Clark sued Cole and others in the county court of Jefferson county. The declaration was in assumpsit, containing the common counts only. The only question of import arises on the sealed contract between the parties, offered in evidence by the plaintiff below. It contained, among other clauses, the following:

"The said party of the first part, for, etc., covenants and agrees to put in a good workmanlike manner, two water-wheels, to drive each a run of stone in the flouring mills (the same that are now in the mill of L. A. Cole & Co., called the Rough and Ready Mills, in said town of Watertown), and warrant the same, with two hundred inches of water to each wheel, to be measured at the bottom of the flume, to grind fifteen bushels per hour, in a style suitable to make good flour; to attach all machinery to said wheels, etc." "And the said parties of the second part covenant, etc., to pay the said Clark $500 for the completion of said work, in case it be done, and the mill performs, when completed, according to the above contract." The county judge charged the jury that they were to be governed by the construction of the contract, and that if they found that both run of stone would grind fifteen bushels per hour, the plaintiff had complied with the said contract in that respect.

To this ruling, exceptions were taken by the plaintiff in error. It was a case, undoubtedly, where the judge was bound, if he could, to construe the contract, and his construction was binding on the jury. But this court is unable to concur with the learned county judge in his construction of the instrument. On the contrary, we are all of opinion that it is too indefinite and uncertain to admit of any interpretation as a matter of law. The offer to introduce *oral* evidence to explain the understanding of the parties was properly rejected. Such evidence is admissible when there is a *latent* ambiguity, which is made to appear by extraneous facts, and which may be made clear by *parol* proof. But the ambiguity in this instance is *patent;* it appears on the face of the instrument; and it arises not from the use of words of art, or technical phrases, nor from the existence of any custom or usage, but from the failure of the parties so to use common and plain words as to express any definite idea. They have not told us themselves what they did mean; whether each run of stone was to grind fifteen bushels per hour, or whether both were to do it, and so their instrument is wholly void. Boardman v. Ford, 6 Peters 345.

The judgment of the county court must be reversed for this cause, and the case must go back for a new trial. The plaintiff then can recover *quantum meruit* upon the common counts, and no more.[1]

Judgment reversed, with costs.

[1] Accord, Sherman v. Kitsmiller, 17 S. & R. (Pa.) 45 (1827).

3. PAYMENT, BY MISTAKE, OF ANOTHER'S OBLIGATION.

CARR v. STEWART.

58 IND. 581.—1877.

THE appellee sued the appellant upon a promissory note, assigned by Moore to appellee. The second paragraph of the answer sets forth a claim against the appellee, which is stated in the opinion.

HOWK, J.—* * * * It appeared from a bill of exceptions, properly in the record, that the appellant offered to prove on the trial, by his own evidence, that he had paid, by mistake, the sum of $20.75 as taxes on certain lands, which he had before that time conveyed to said Moore, the payee and endorser of the note in suit; that, after the appellant's conveyance to said Moore of said lands, they were not transferred and assessed for taxation, in the name of said Moore, as they ought to have been, but they continued to be assessed for taxation, in the appellant's name; and that, when he, the appellant, paid the taxes on his own lands, of which he had about 2,000 acres assessed to him, he, by mistake, paid the taxes on Moore's lands, to the amount of $20.75, without noticing that Moore's lands were still assessed to him for taxation; and that this payment was made by the appellant before he had any notice of the assignment by Moore of the note in suit.

These were the facts which the appellant offered to prove on the trial, by his own evidence; and, upon these facts, this question arises: Could the appellant have maintained a direct action against said Moore, upon the facts stated, to recover from him the amount so paid by the appellant? It seems very clear to us that this question must be answered in the negative. The appellant did not offer to prove, that the amount so paid by him was paid with the knowledge and consent, or upon the request, of said Moore, or that said Moore had subsequently promised to repay said amount. The appellant's payment of Moore's taxes, though made by mistake, must be regarded as a voluntary payment; and the law is well settled in this state, that such payments cannot be recovered back. Bevan v. Tomlinson, 25 Ind. 253, and Shirts v. Irons, 28 Ind. 458.

The law did not make it Moore's duty to have his deed from the appellant recorded; and if, by reason only of Moore's failure to have his deed recorded, the appellant was induced or caused to pay the said taxes by mistake, this fact would not, in our opinion, give the appellant a cause of action to recover from said Moore the taxes thus paid.[1] * * * *

[1] In Butler v. Rice, [1910] 2 Ch. 277, subrogation in equity was allowed to a stranger who, by mistake, paid off a mortgage, without request by the mortgagor. See note, 24 Har. L. Rev. 161.

MUIR v. CRAIG.

3 BLACKF. (IND.) 293.—1833.

BILL in chancery.

BLACKFORD, J.—* * * * The question which is presented by this case is whether the purchaser at a sheriff's sale of land, to which the execution debtor had no title, but which belonged at the time to the United States, can recover from the debtor, in equity, the amount of the purchase money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor? We find this question, so far as it could arise in a case of the sale of a negro, decided in the affirmative by the Court of Appeals in Kentucky in McGhee v. Ellis, 4 Litt. 245. Our opinion is in accordance with that decision, the principle of which must, we conceive, be applicable to a case of the sale of land. Craig's debt to Jennings [the execution creditor], as to $295, has been paid by Muir. The consideration for that payment, viz: the land sold by the sheriff to Muir as Craig's property, has entirely failed. Muir must be entitled, under the circumstances of the case, to recover, in equity, from Craig, who has received the benefit, the purchase money paid to the sheriff for the land, with interest. The decree of the Circuit Court in favor of the defendant is erroneous and must be reversed.[1]

[1] In M'Ghee v. Ellis, 4 Litt. (Ky.) 245 (1823), the court says (p. 246): "What is the situation of the debtor? By his own act in creating the debt and then refusing to discharge it he is guilty of a wrong upon the creditor, which subjects him to legal process and the sentence of the constituted authorities of his country, that he shall pay the debt. The sheriff, with the judicial process in his hand, seeks his estate, and perhaps acting honestly and innocently, takes, by mistake, the estate of another and exposes it for sale. By the act of sale and the return of the officer, *his* debt is discharged, his wrong against his creditor is purged, and the creditor is estopped by the return from again resorting to the judgment. To the judgment, and also the proceeding under the execution, both he and the creditor are parties, and while that remains in force, each is concluded by the return, as was decided by this court in the case of Smith v. Hornbeck, Reed and others. (The case of Smith v. Hornbeck and Reed was decided at the fall term, 1821, and may be considered as a leading case; but I was prohibited from publishing it because it contained no principle which was not contained in some case in print. It was referred to in the case of Small and Carr v. Hodgen, decided at the next term, 1 Litt. Rep. 17, which last case decides the same principle.) From this process and this mistaken act of the sheriff the debtor receives a benefit direct, his debt is discharged and the money of the purchaser is paid, laid out and expended for his benefit. It may, indeed, be said that the proceedings against him are *in invitum,* and that, from that circumstance, his request that the money should be so laid out cannot be presumed, and therefore that an action for money paid, laid out and expended could not be sustained. To this it may be responded that if the promise cannot be presumed so that assumpsit may be maintained he is under a strong moral claim, which may be enforced in equity."

DRESSER v. KRONBERG.

108 MAINE 423.—1912.

CORNISH, J.—The defendant, Kronberg, recovered judgment against one Waterhouse, took out execution, and caused two horses which had been previously attached on mesne process to be sold upon execution at sheriff's sale, as the property of Waterhouse, to the plaintiff for the sum of $58, and the proceeds of the sale were paid by the officer to the defendant in this action as the judgment creditor in the execution.

Subsequently the horses were replevied by the Saco Grain & Milling Company as the true owner thereof, and judgment in the replevin suit was duly rendered in favor of said company. Thereupon the plaintiff, Dresser, brought this action of assumpsit for money had and received against the defendant, the judgment creditor in the original action. The presiding judge directed a verdict in favor of the plaintiff, and the case is before this court on defendant's exceptions to this ruling.

A single question of law is involved, namely, whether a bona fide purchaser for value of chattels at a sheriff's sale can recover from the judgment creditor in an action for money had and received, when the chattels sold were at the time of sale the property not of the judgment debtor but of a third party.

It should be observed at the outset that the action of assumpsit for money had and received is comprehensive in its reach and scope. Though the form of the procedure is in law, it is equitable in spirit and purpose, and the substantial justice which it promotes renders it favored of the courts. "It is a familiar principle," says the court in Pease v. Bamford, 96 Maine 23, 51 Atl. 234, "that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such a case an action for money had and received may be maintained." This is but the affirmation of the early statement of Lord Mansfield in Moses v. McFerlan, 2 Burr. 1012, that when, ex æquo et bono, the plaintiff is better entitled to the thing than the defendant is to withhold it from him, he may recover in this form of action.

The instances in which the courts have applied this doctrine are so numerous and varied as to render citation of authorities unnecessary. The question is: Should it be applied in the case at bar? It is conceded that the attempted sale of chattels not belonging to the judgment debtor was void and conveyed no title to the plaintiff, the would be purchaser. Farrant v. Thompston, 5 Barn. & Ald. 826; Buffum v. Deane, 8 Cush. (Mass.) 35; Champney v. Smith, 15 Gray (Mass.) 512; Coombs v. Gorden, 59 Maine 111. The execution was not in itself a nullity, but it gave no authority to proceed against

the property which was sold. It authorized the sale of the property of the judgment debtor, but not of a stranger.

It is further conceded that the plaintiff purchased the property in good faith, assuming, as we think he had a right to assume, that it belonged to the judgment debtor, and that he was securing a good title thereto. This proved to be a mistake in fact, for the title absolutely failed. No consideration whatever passed to the plaintiff for the money which he paid through the hands of the sheriff into the pocket of the defendant. The price paid does not belong to the defendant, because the property sold did not belong to the judgment debtor, and a creditor cannot satisfy his execution against A. by seizing the property of B. On the other hand, the money does belong to the plaintiff, who parted with it without consideration. Why should not the repayment by the party who is not entitled to it to the party to whom it belongs be compelled by means of this legal process designed to meet just such cases? No one loses thereby. The true owner has recovered his property, the judgment debtor cannot have his debt paid with the property of another, and the judgment creditor, the defendant in this suit, after repayment, can obtain a new execution upon the judgment for the full amount by a writ of scire facias. Wilson v. Green, 19 Pick. (Mass.) 433; Pillsbury v. Smyth, 25 Maine 427; Rice v. Cook, 75 Maine 45. A result which restores to each his own is equitable, and therefore desirable.

Suppose the judgment creditor bids in the property at the sale, and subsequently it is taken from him as the property of another. Clearly a new execution for the full amount would be granted. Piscataquis County v. Kingsbury, 73 Maine 326. The situation is no different if the purchase has been made by another and the creditor has repaid the purchase price, either voluntarily or involuntarily. The original purchase was under a mistake of fact, and the remedy here asked puts the parties in statu quo.

We are aware that the courts in some other jurisdictions, notably in Indiana and Illinois, have denied recovery from the judgment creditor; but we are unable to assent to the force of the reasoning by which that conclusion is reached. Dunn v. Frazier, 8 Blackf. (Ind.) 432; Lewark v. Carter, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, and note to same in 3 L. R. A. 440; England v. Clark, 5 Ill. 487. The decisions in Indiana are placed upon the ground that the doctrine of caveat emptor applies with full force in all judicial sales, and that the purchaser buys at his peril. This statement, when rightly interpreted, is true; but it simply means that there is no guaranty or warranty of title because the purchaser takes, and can only take, whatever title the debtor has. Therefore, in the absence of fraud, the law will not ordinarily relieve a purchaser from a defective title and a partial failure of consideration, as, for instance, an outstanding incumbrance or a lien for taxes. Ritter v. Henshaw, 7 Iowa, 97; Parker v. Rodman, 84 Ind. 256. But the doctrine is not carried to the extent that in case of absolute failure of title the pur-

chaser is without remedy. Even the states which deny a right of action against the creditor grant it against the judgment debtor. McGhee v. Ellis, 4 Litt. (Ky.) 244, 14 Am. Dec. 124; Price v. Boyd, 1 Dana (Ky.) 434; Geoghegan v. Ditto, 59 Ky. 433, 74 Am. Dec. 413; Julian v. Beal, 26 Ind. 220, 89 Am. Dec. 460; Westfield v. Williams, 59 Ind. 221; Coan v. Grimes, 63 Ind. 21.

The principle of equitable recovery against one party is stated in Julian v. Beal, supra, as follows: "When the judgment defendant has no title whatever in the lands sold at sheriff's sale, there is no consideration for the promise of the purchaser to pay the purchase money, and when a bid is made under a mistake of fact in this respect, the bidder is not bound to complete his purchase; but if he should pay the purchase money, he may recover it back from the judgment defendant whose debt was thereby paid." We fail to see why the same payment under the same mistake of fact does not apply with equal force to the judgment creditor. The debtor has been entirely passive in the whole proceeding, while the creditor has set in motion the legal machinery whereby the sale of a stranger's property has been illegally made, and now seeks to inequitably retain the benefit therefrom. The fallacy of the doctrine lies, perhaps, in holding that the judgment against the debtor has been paid, and that therefore the purchaser has expended money for his benefit, while to compel the creditor to refund would deprive him both of the money and the judgment. It is true that nominal payment has been made, but not real payment. The judgment has not been satisfied, but may be revived, and an alias execution issued on scire facias for the full amount, when all the facts are disclosed.

The leading case in Illinois, England v. Clark, 5 Ill. 487, in denying the purchaser recovery against the judgment creditor, though practically conceding it might exist against the debtor, laid emphasis upon the want of privity of contract between the purchaser and the creditor and no implied contract on the part of the latter.

The answer to this proposition is that there need be no privity of contract between the parties, in order to support an action for money had and received, except that which results from one man's having another's money which he has not a right conscientiously to retain. The law then creates both the privity and the contract. Hall v. Marston, 17 Mass. 575; Keene v. Sage, 75 Maine 138.

While the precise question involved here has not before been squarely presented to the court in this state for determination, it has arisen incidentlly on two occasions, and the language of the court in those cases is in harmony with the conclusion here reached. [The court here discusses Pillsbury v. Smyth, 25 Maine 427 and County of Piscataquis v. Kingsbury, 75 Maine 326.]

It is therefore the opinion of the court that this action is maintainable under the facts of this case, and that the ruling of the presiding judge in directing a verdict for the plaintiff was without error.

Exceptions overruled.

CONCORD COAL CO. v. FERRIN ET AL.

71 N. H. 33.—1901.

ASSUMPSIT by the Concord Coal Company against one Ferrin and another. Verdict rendered for defendants, and case transferred on plaintiff's exceptions. Exceptions overruled.

One Bean, being indebted to the defendants for labor upon a model of an appliance invented by him, and having been requested to make payment, informed the defendants that one of the plaintiffs, Day, was backing him, and that he would get the plaintiff company to furnish a ton of coal for application as payment upon his indebtedness; and the defendants agreed to accept a ton of coal in part payment. Bean thereupon informed the plaintiffs that the defendants wanted a ton of coal, without saying anything about the arrangement he had made with them. The coal was delivered to the defendants and used by them in their business. The plaintiffs charged the coal to the defendants. Demand for payment was made upon the defendants by the plaintiffs by letter within six months after the coal was delivered, and again after about a year. An oral demand was subsequently made on several occasions, and the defendants on each occasion denied their liability. The defendants credited the coal to Bean's account. Day was not in fact backing Bean, and had given him no authority to bind him in any way. The defendants knew that the coal came from the Concord Coal Company, and that the plaintiffs were a firm composed of Day and one Emmons. Both parties acted in entire good faith, but were deceived by Bean.

PARSONS, J.—Both parties understood that upon the delivery of the coal the title passed to the defendants. Their misunderstanding related solely to the mode of payment. The plaintiffs understood the defendants were to pay them the customary price, and charged the coal to them. The defendants understood the coal was delivered as a payment upon Bean's indebtedness to them, and credited it upon his account. The plaintiffs understood their delivery was of coal to be paid for in cash in the ordinary course of business. The defendants understood their acceptance was of coal for which they had already paid. To this branch of a contract of sale the parties did not agree in fact, either in terms or by inference. Hence there was no contract in fact, express or tacit (Sceva v. True, 53 N. H. 627, 632), because of the mutual mistake as to payment. As there was no contract of sale, in the absence of any estoppel, upon discovery of the mistake the plaintiffs might have retaken their coal if it remained distinguishable from other coal of the defendants, or the defendants might have required the plaintiffs to remove it. As the plaintiffs had no right of action by virtue of the mistaken acceptance of the coal, they cannot now recover except by virtue of some further facts. The additional facts stated are that the defendants used the coal in their business, and the plaintiffs, within six months and subsequently, made sundry demands for payment. It does not appear that the plain-

tiffs ever demanded the return of the coal; but, on the contrary, they appear to have uniformly insisted upon the contract as they understood it. In the original transaction both parties acted in entire good faith, but were deceived by Bean. Upon these facts the trial court found a verdict for the defendants. This verdict must stand unless the specific facts found are inconsistent therewith as matter of law.

The plaintiffs' claim is that the defendants by their use of the coal charged themselves with the legal duty of paying for it in accordance with the plaintiffs' understanding of the contract, rather than their own, or at least of paying anew in money the usual price or value of the coal. The question is, how ought the coal to be paid for,—in accord with the understanding of the plaintiffs, or with that of the defendants? It is manifest that if the plaintiffs had accompanied the delivery of the coal with an invoice charging the defendants with the price, or had informed them it was delivered on their credit, or if before delivery the plaintiffs had inquired of the defendants as to Bean's authority, or if the defendants, before accepting the coal, had informed the plaintiffs that they accepted it only for application on Bean's debt, the controversy would have been avoided. Whether, under all the circumstances, the defendants accepted or the plaintiffs delivered the coal under such circumstances that either of them are now estopped to set up their understanding of the transaction, is mainly a question of fact. If it were found that the defendants were thus in default, they would be bound in contract by estoppel (Sceva v. True, *supra*); while, if the plaintiffs were considered to be similarly estopped, the case would also be determined upon that ground. As the general verdict is found for the defendants, it must be understood at least to embrace a finding that no estoppel exists against the defendants. Bank v. Church, 69 N. H. 582, 44 Atl. 105.

The facts disclose no contract in fact, express, tacit, by estoppel, or implied in fact; and the sole remaining question is whether the facts establish a contract implied in law, or a contract of legal duty, sometimes called a quasi contract. Sceva v. True, *supra*. A promise to pay what it is one's legal duty to pay is implied by law. Bixby v. Moor, 51 N. H. 402-404; Eastman v. Clark, 53 N. H. 276, 280, 16 Am. Rep. 192; Sceva v. True, 53 N. H. 627, 631-633; Water Co. v. Metcalf, 63 N. H. 427; Gage v. Gage, 66 N. H. 282, 283, 29 Atl. 543, 28 L. R. A. 829; Clark v. Sanborn, 68 N. H. 411, 36 Atl. 14. In this case the legal duty is wanting, unless it can be predicated upon the mere possession and use of property. The mere fact of benefit received is insufficient to establish the legal duty of payment. Clark v. Sanborn, *supra*, is precisely in point. There the plaintiff was unable to recover for services valuable to the defendants, rendered under the expectation that they would be paid for, for the reason that the defendants did not accept the services with the understanding that they were to make payment. In the absence of privity of contract, the mere possession and use of property will not imply a promise to pay for it. Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Hills v. Snell, 104 Mass. 173, 177, 6 Am. Rep. 216; Boulton v. Jones, 2 Hurl. & N. 564; Benj. Sales, §§ 59, 416. It is contended that the plaintiffs can recover because otherwise the defendants would be un-

justly enriched at the plaintiffs' expense. But that fact is not found. Both parties trusted and were deceived by Bean. If the plaintiffs cannot recover of the defendants for the coal, they have a claim against Bean for its value; while, if the defendants were obliged to pay for the coal, they would also have a claim against Bean for the same amount. It may be assumed that Bean is worthless. But there is no equitable reason why the plaintiffs rather than the defendants should be released from the consequences of their trust in Bean. In view of the inference of freedom from fault which the general verdict finds for the defendants, the defendants' equity is at least equal with that of the plaintiffs.

As no facts are found inconsistent with the general verdict found for the defendants, the verdict cannot be disturbed.

Exceptions overruled.

BLODGETT, C. J., did not sit. The others concurred.

---

4. MISTAKE AS TO THE TITLE OF A VENDOR.

DORSEY v. JACKMAN.

1 S. & R. (PA.) 42.—1814.

TILGHMAN, C. J.—This is an action for money had and received, brought by Jackman, the plaintiff below, against Dorsey, the defendant, who had sold and conveyed to the plaintiff a tract of land without warranty of any kind.[1] The plaintiff had paid the purchase money, after which, apprehending the title to be defective, and having made a second purchase from the person in whom he supposed the true title to be vested, he brought this action to recover the money paid on the bad title. The president of the court of common pleas of Washington county, charged the jury in favor of the plaintiff, whereupon the counsel for the defendant excepted to his opinion, and the cause has been removed to this court by writ of error.

The opinion of the court of common pleas was founded upon this principle, that the action for money had and received is in nature of a bill in equity, and lies in all cases where the defendant has received money which he cannot, in good conscience, retain. The money having been paid in this case for land, to which the defendant had no title, the consideration of the payment has failed, and therefore, it is concluded, ought to be refunded. But although the title has proved defective, it does not follow that the money cannot, in good conscience, be retained, because it may have been the intent of the parties, that the purchaser should run the risk of the title. Between the sale of *goods* and of *lands* there is a marked distinction. In the former, the law implies a warranty, but not in the latter. This distinction is of long standing, not founded on an arbitrary rule, but existing in the nature of things. With regard to *goods*, possession is strong evidence of title, and the only evidence which, in most cases, the purchaser can obtain. But as to *lands*, the case is altogether different, because the title depends on writings

[1] By the antecedent contract the vendor promised merely "to sell and convey" the land.

only. Of these writings, one party is as able to judge as the other; the construction is often doubtful, and in doubtful cases, where the purchaser requires no warranty, it is reasonable, that the price should be reduced in proportion to the hazard. When it has been long understood, that no warranty is implied on a sale of lands, it must be supposed that both buyer and seller proceeded on that understanding. Consequently, the purchase money may be retained with good conscience. I take for granted, that the seller has practiced no fraud or deception. If he has, the case is altered, and the purchaser may be relieved on other grounds than failure of the consideration.

That the law has been held as I have mentioned, will appear, not only from the opinions of elementary writers, but from adjudged cases, both at law and in equity, and I know of no adjudged case of good authority to the contrary. In the case of Lord Burkhurst v. Fenner &c., Executors of Lady Dacres, 1 Rep. 1, it was determined that if one seised in fee convey to another in fee, without warranty, and without mention of title-papers, yet the papers pass to the feoffee, "because he is to defend the land at his peril; it is, therefore, reasonable, that he should have the papers as incident to the land, and that the feoffer should not have them, because he can receive no benefit by keeping them, nor sustain damage by delivering them." In Sergeant Maynard's case (2 Freem. 1), the sergeant had purchased land and paid his money, but a common recovery being necessary to complete the title, he took a bond from the seller, conditioned for the suffering of the recovery, but the sergeant having discovered a defect in the title, filed a bill in equity to obtain restitution of his money; but the court decreed against him, because it did not appear that the seller had been guilty of any fraud. In 1 Fonbl. 363 to 366 (*notes*), the cases on this subject are collected, and the law laid down in the same manner. In Boyd v. Bopst, tried before Chief Justice McKean and Judge Rush, at Easton, June, 1785 (2 Dall. 91), it is said, that the rule *caveat emptor* applies only to *real estate*. In Cain v. Henderson, 2 Binn. 108, it was decided by this court, that the grantor who has given no warranty is a competent witness to support the title of the grantee. This I take to be, and *always to have been*, the practice in *all the courts of Pennsylvania*, and is incompatible with the principle of the grantor being answerable in an action for money had and received. * * * *

Confining myself, then, to the present case, it appears to me, that to support the action would be to introduce a dangerous innovation, tending to disturb what has long been considered as settled. I am, therefore, of opinion that the judgment should be reversed and a *venire facias de novo* awarded. [Concurring opinion by YEATES, J.; dissenting opinion by BRACKENRIDGE, J.][1]

[1] Contra, Davis v. Lee, 52 Wash. 330 (1909), the court saying that "the appellant Lee agreed * * * to do two things: to sell the land described in the contract, and make a quitclaim deed. He has made the deed but he has failed to sell the land. * * * Having agreed to sell something he never owned, he can not discharge that part of his agreement. Hence it follows that respondent is entitled to recover the purchase price."

In Whittemore v. Farrington, 76 N. Y. 452 (1879), the suit was brought

NORTON v. MARDEN.

15 ME. 45.—1838.

ASSUMPSIT for money had and received, brought to recover back the consideration money paid by the plaintiff to the defendant for the assignment of a bond of a lot of land in Bangor. The defendant held by assignment a bond for the conveyance of the lot, described in the bond, on payment of a specified sum. Prior to the bargain between these parties, there being no evidence that the defendant knew where the lot was, they went together and enquired and entered upon land supposed by them to be the same described in the bond, and thereupon the defendant assigned over the bond and received the price agreed on. The plaintiff soon afterwards discovered that the lot described in the bond was a different one from that seen by the parties, and much inferior to it, and gave notice thereof to the defendant, offered back the bond, and demanded the money paid by him. The trial was before SHEPLEY, J., who instructed the jury, that if they were satisfied from the testimony that the defendant showed to the plaintiff a different lot from that described in the bond, before the contract was made between them; and that it was made upon that erroneous information; and that from the description in the bond he was not undeceived, they would find for the plaintiff, whether such erroneous information was given by the defendant fraudulently, or through mistake, or want of information on the part of the defendant; and if not thus satisfied, they should find for

to rescind an agreement between the parties for an exchange of lands and for a reconveyance of the lands deeded under said agreement, or that defendant be required to remove incumbrances on the lands deeded by him under the agreement. The court said: "A party who, under a verbal agreement for the conveyance to him of lands, is entitled to insist upon a good title, and a deed with covenants, pays the consideration and is then tendered a deed without covenants. He demands a deed with covenants and this is refused. He then accepts the deed without covenants, and, believing the title to be clear, records it, and continues to occupy and improve the property. An encumbrance unknown at the time to both parties is afterwards discovered. Both parties are innocent of any fraud. It is conceded that no legal liability rests upon the grantor in such a case. (Bates v. Delavan, 5 Paige, 300, 307; Burwell v. Jackson, 9 N. Y. 535.) In the absence of fraud or covenants a purchaser takes the title at his own risk. Then do the facts stated entitled the plaintiff to any equitable relief? We think not." Contra, White v. Murray, 218 Fed. 933 (1914), that a condition in the contract with respect to a warranty is not merged in the deed which did not contain such warranty. See 28 Har. L. Rev. 719.

Upon the conflict as to whether there is, in a land contract, an implied condition that the vendor shall make a deed with warranty, See 9 Col. L. Rev. 551.

In Earle v. Bickford, 6 Allen 549 (1863), the conveyance was made by the assignee of an insolvent debtor without legal authority. The conveyance was a quit-claim deed and it was held that "the general doctrine is that the grantee who takes such a deed cannot recover back the consideration money in case of a failure of the title; but that doctrine does not apply to this case. If the title fails for want of authority in the person who makes the deed to act in the capacity in which he professes to act, the consideration may be recovered back. Shearer v. Fowler, 7 Mass. 31; Williams v. Reed, 5 Pick. 480; Dill v. Wareham, 7 Met. 438; Holden v. Curtis, 2 N. H. 61."

the defendant. The verdict was for the plaintiff, and the defendant excepted.

SHEPLEY, J.—* * * * It is also insisted, that the case is within the principle of the decisions of this court, that the party, who takes a deed of release of real estate, if he obtain thereby no title, cannot recover back the money paid. Both parties in such cases must be supposed to understand the tract of land purporting to be conveyed. And the absence of all covenants of title is satisfactory evidence that they knew that the title was doubtful, and that the contract was made upon that basis. If in such cases there is any mistake, it is rather a mistake of law, than of fact. But the substance of the contract is, that the party purchasing agrees to purchase the other's right, whatever it may be, and take the risk of the title upon himself. And in such cases there is no principle of law which authorizes him to reclaim the purchase money in case of an entire failure of title. This is not the case of a conveyance of real estate, but the assignment of a contract for a conveyance, and the contract of assignment made upon a mistake of facts. And there is no evidence that the plaintiff obtained any benefit from it.

Exceptions overruled, and judgment on the verdict.

EARL, J., IN MOORE v. WILLIAMS.

115 N. Y. 586, 592.—1889.

BUT, aside from the language used in the contract, it is familiar law that an agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects. His right to an indisputable title, clear of defects and incumbrances, does not depend upon the agreement of the parties, but is given by the law. (Sugden on Vendors (13th ed.) 14; Rawle on Cov. 430; Burwell v. Jackson, 9 N. Y. 535; Delavan v. Duncan, 49 id. 485.) Within the meaning of this rule, at least, according to the decisions in this state, a good title means not merely a title valid, in fact, but a marketable title which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money. A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by resort to parol evidence, or when there is an apparent incumbrance which can be removed or defeated only by such evidence; and, so far as there are any exceptions to this rule, they are extraordinary cases in which it is very clear that the purchaser can suffer no harm from the defect or incumbrance. In Swayne v.

Lyon (67 Pa. 436), SHARSWOOD, J., said: "It has been well and wisely settled that, under a contract for the sale of real estate, the vendee has the right not merely to have conveyed to him a good title, but an indubitable one. Only such a title is deemed marketable; for otherwise the purchaser may be buying a law suit which will be a very severe loss to him both of time and money, even if he ultimately succeeds. Hence it has been often held that a title is not marketable when it exposes the party holding it to litigation." In Dobbs v. Norcross (24 N. J. Eq. 327), it was held that "every purchaser of land has a right to demand a title which shall put him in all reasonable security and which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him and probably take from him the land upon which money was invested. He should have a title which should enable him, not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."[1]

TAYLOR v. HARE.

1 Bos. & P. N. R. 260.—1805.

PLAINTIFF and defendant made a contract whereby plaintiff in return for a consideration to be paid was to have the use of a patent right which defendant had obtained as the inventor. Plaintiff used the patent and paid the stipulated sums to defendant. It later appeared that the defendant was not the inventor of the invention for which he had obtained the patent; the apparatus having been in public use before defendant obtained his patent. This fact was unknown to both plaintiff and defendant at the time of the performance of the contract. The defendant's patent was not repealed. Plaintiff sues to recover back the sums he paid for the use of the patent.

SIR JAMES MANSFIELD, C. J.—It is not pretended that any action like the present has ever been known. In this case two persons equally innocent make a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent right, and the plaintiff supposing the same thing. Under these circumstances the latter agrees to pay the former for the use of the invention, and he has the use of it; *non constat* what advantage he made of it; for anything that appears he may have made considerable profit. These persons may be considered in some measure as partners in the benefit of this invention. In consideration of a certain sum of money the defendant permits the plaintiff to make use of this invention, which he would never have thought of using had not the privilege been transferred to him. How then can we

[1]Accord, even when the executory contract provides for a quitclaim deed, Wallach v. Riverside Bank, 206 N. Y. 434 (1912).

say that the plaintiff ought to recover back all that he has paid? I think that there must be judgment for the defendant.

HEATH, J.—There never has been a case and there never will be, in which a plaintiff, having received benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid. We cannot take an account here of the profits. It might as well be said, that if a man lease land, and the lessee pay rent, and afterward be evicted, that he shall recover back the rent, though he has taken the fruits of the land.

ROOKE, J.—I am of the same opinion.

CHAMBRE, J.—The plaintiff has had the enjoyment of what he stipulated for, and in this action the court ought not to interfere, unless there be something *ex aequo et bono* which shows that the defendant ought to refund. Here both parties have been mistaken; the defendant has thrown away his money in obtaining a patent for his own invention; not so the plaintiff, for he has had the use of another person's invention for his money. In the case of Arkwright's patent, which was not overturned till very near the period at which it would have expired, very large sums of money had been paid and though something certainly was paid for the use of the machines, yet the main part was paid for the privilege of using the patent right, but no money ever was recovered back which had been paid for the use of that patent. I am therefore of opinion that judgment of non-suit should be entered.

Judgment of non-suit.

SMART v. GALE.

62 N. H. 62.—1882.

ASSUMPSIT for money had and received. Facts found by a referee. September 3, 1879, the plaintiff purchased of the defendant the stock of goods, furniture, fixtures and good will of a fruit store in Concord, for the sum of $3,200, with an agreement that neither the defendant, nor his son who had been a clerk in the store, should engage in the same business in Concord for ten years, agreeing to pay therefor by conveying to the defendant a house valued at $2,400, and giving notes for $600 and $200, secured by mortgage on all the property in the store except the stock. The defendant, by a bill of sale under seal, conveyed to the plaintiff all the stock in trade, furniture, fixtures, including shelving and counters, and all other personal property in the store and store-cellar. The bill of sale also contained the following: "And I hereby covenant with the said grantee, that I am the lawful owner of the said goods and chattels, that they are free from all incumbrances, and that I have good right to sell the same as aforesaid, and that I will warrant and

defend the same against the lawful claims and demands of all persons." He also gave to the plaintiff a bond in accordance with his agreement not to engage in business for ten years. The plaintiff conveyed the house to the defendant, and gave him a note for $600, and a note for $200, secured by mortgage, as had been agreed. No price was fixed for any portion of the defendant's property separate from the rest. The plaintiff immediately entered into possession of the store and other property purchased. He did not rescind or attempt to rescind the contract. He did not reconvey or offer the property, or any part of it, back to the defendant. In December, 1879, he was informed that the owner of the store owned the fixtures, and thereupon he commenced this action, December 17, 1879. He continued to occupy the store till about June 1, 1880, when he abandoned it and surrendered the key to the agent of the owner, leaving therein all the property purchased of the defendant except the stock of goods.

Clark, J.—The plaintiff seeks to recover the value of the fixtures on the ground of a failure of consideration. This is not a case of a payment made upon a legal consideration which has wholly failed, and may therefore be recovered back. Leach v. Tilton, 40 N. H. 473, 475. There was no separate valuation of the fixtures, and no offer to return them. Weeks v. Robie, 42 N. H. 316. The contract was entire, and has never been rescinded, and the action cannot be maintained. Way v. Cutting, 17 N. H. 450; Miner v. Bradley, 22 Pick. 457; Clark v. Baker, 5 Met. 452; Bassett v. Percival, 5 Allen 345.

Judgment for the defendant.

STEELE v. SANCHEZ.

80 Iowa 507.—1890.

Beck, J.—1. Plaintiff alleges in his petition that under a parol contract he delivered certain stone to defendant, and asks to recover therefor. A second count upon the same action is in the *quantum meruit* form, but recovery is sought upon one count only. Defendant, answering these counts of the petition, alleges that he owned a quarry from which plaintiff, under a parol contract with him, quarried and removed stone, being bound to pay defendant 15 per cent. of the stone quarried; and the stone in question in this case was received by defendant under this contract. The answer sets up a counter-claim for stone received by plaintiff and not paid for. An amended petition seeks to recover for stone delivered to defendant upon a contract under which he was to quarry stone upon land claimed by defendant, and deliver a part of the stone to defendant. The defendant had no title to the quarry, or right to obtain or sell stone therefrom, and therefore plaintiff is entitled to recover at least the value of his labor in quarrying the stone. The plaintiff re-

plied to defendant's answer, denying all allegations thereof, "but admits that defendant received the stone named, and many more." The reply contains this language: "Says there was some kind of a contract between him and the defendant by which he was to pay for the stone in the quarry, but said such contract was without consideration in this: that defendant represented to plaintiff that he was the owner of the stone when they lay in the quarry in the bed of the Des Moines river, and plaintiff agreed to pay for the stone on the theory that defendant was the owner of the same, but that he has since ascertained that defendant never had any title to the bed of the river at that place." Defendant filed an amended answer showing that he was in possession of the quarry, and made with plaintiff a parol contract to the effect that defendant would permit plaintiff to quarry stone in the quarry, and take them out over the land of defendant, and deposit them on defendant's land, on condition that he would deliver defendant 15 per cent. of the stone quarried, and that defendant was not to pay plaintiff for the stone, or for the labor of quarrying them. The plaintiff filed a reply to this amended answer, making his reply to the original answer his reply to this amended answer.

2. Under the decision of this court in this case when here before, defendant has no title to the land upon which the quarry is situated, and no right to the stone quarried therefrom. Therefore, there was no consideration for the contract under which the stone was delivered to defendant by plaintiff. 72 Iowa 65, 33 N. W. Rep. 366. That there was a contract under which plaintiff delivered the stone for which suit is brought is admitted by plaintiff, while not admitting its terms and conditions as stated by defendant. But he admits, in effect, that the stone was received by defendant upon a contract under which he was bound to pay for them. The contract, it clearly appears, was for future receipt of and payment for stone by plaintiff. It was therefore an executory contract which plaintiff performed. He cannot, after having voluntarily performed it, and received its fruits, without being disturbed in their enjoyment, set up the want of consideration. Maxwell v. Graves, 59 Iowa 613, 13 N. W. Rep. 758; Bish. Cont., §§ 50, 81.

The existence of a contract and the receipt of the stone by plaintiff under it, is admitted by the pleading; and there is evidence tending to establish it. We need not inquire as to the terms and conditions. It is sufficient to know that plaintiff received the stone, and used them without disturbance under the executory contract, and upon these facts there can be no doubt, and there may be said to be no conflict in the evidence. He cannot, as we have seen, set up want of consideration after having received the fruit of his executory contract, and never having been deprived thereof. Upon these considerations the court below should have entered judgment against plaintiff. The judgment for plaintiff, in this view of the case, is wholly without the support of evidence.

Other questions in the case need not be considered, as the judg-

ment of the court below must be reversed, and they may not arise in another trial. Reversed.

---

5. IMPROVEMENTS PUT BY MISTAKE UPON THE PROPERTY OF ANOTHER.

WILLIAMS, ADMINISTRATOR, v. GIBBES AND ANOTHER, EXECUTORS, GIBBES AND ANOTHER, EXECUTORS, v. WILLIAMS, ADMINISTRATOR.

20 How. (U. S.) 535.—1857.

THESE were cross appeals from the Circuit Court of the United States for the district of Maryland. In the report, the first case only will be mentioned; namely, that of Williams against Oliver's executors. The case was formerly before the court, and is reported in 17 How. 239.

The decree was for $9,686.33 in money, and $19,215.95 in stock, instead of $22,866.94 in money, and $32,847.77 in stock, as claimed by the appellant.

MR. JUSTICE NELSON.—This is an appeal from a decree of the Circuit Court of the United States for the district of Maryland. A bill was filed in the court below by Williams, the present appellant, to recover of the defendants the proceeds of the share of complainant's intestate in what is known as the Baltimore Company, which had a claim against the Mexican government, that was awarded to it under the treaty of 1839. The proceeds of the share amounted to the sum of $41,306.41. The history of the litigation to which the award under the treaty gave rise, in the distribution of the fund among the claimants or the assignees composing the Baltimore Company, will be found in the report of four of the cases which have heretofore come before this court—11 How. 529; 12 How. 111; 14 How. 610; 17 How. 233, 239. That of Williams v. Gibbes, in 17 How., contains the report of the present case when formerly here. This court then decided that the claim of the executors of Oliver to the share of Williams was not well founded; that the interest of Williams in the same had not been legally divested during his lifetime; and that his legal representative then before the court was entitled to the proceeds. The decree of the court below was reversed, and the cause remanded for further proceedings, in conformity with the opinion of the court. Upon the cause coming down before that court on the mandate, the defendants, the executors of Oliver, set up several charges against the fund, which it was claimed should be received and allowed in abatement of the amount.

1. For certain costs and expenses to which they had been subjected in resisting suits instituted against it by third parties. The

history of these suits will be found in the cases already referred to in this court, and need not be stated at large.

2. For services and expenses of Oliver in his lifetime, in the prosecution of the claim of the Baltimore Company, as its attorney and agent before the government of Mexico, from the year 1825 down to the time of his death in 1834.

The court below allowed to the executors the costs and expenses to which they had been subjected in defending the suits mentioned, and also thirty-five per cent. of the fund in question for the services of Oliver.

The case is one in many of its features novel and peculiar. James Williams, the intestate, and owner of the share in the Baltimore Company, became insolvent in 1819, and took the benefit of the insolvent laws of Maryland; and in 1825 the insolvent trustee of his estate sold and assigned to Robert Oliver the share in question in this company; and from thence down to the year 1849, Oliver in his lifetime, and his executors afterwards, did not doubt but that a perfect title to the share had passed by virtue of this assignment. In that year the Court of Appeals of Maryland decided, in a case between the executors and an insolvent trustee of Williams, that no title passed to Oliver by this assignment; and as a legal consequence it was held by this court, in 17 How., that the interest remained in Williams at his death, and of course passed to his legal representative, the complainant. All the services and expenses, therefore, of Oliver, in his lifetime, in the prosecution of the claims of the Baltimore Company against the government of Mexico, and of the litigation since encountered by his executors in respect to the share, have resulted in securing the proceeds of the same to the estate of Williams, the original shareholder. Williams in his lifetime, and his legal representative since, down till the fund was in court awaiting distribution, had taken no steps for its recovery, nor had they been subjected to any expense. The whole of the services had been rendered and expenses borne by Oliver and his executors; and the question is whether, upon any established principles of law or equity, the court below were right in taking into the account, in the settlement between the parties, these services and expenses. We are of opinion they were.

By the judgment of the Court of Appeals of Maryland, Oliver was at no time the true owner of this share; as, notwithstanding the assignment by the insolvent trustee, it still remained in Williams. Oliver thereby became trustee instead of owner of the share and of the proceeds, as did also his executors; and they must be regarded as holding this relation to the fund from their first connection with it. In that character the executors have been made accountable to the estate of Williams, and have been responsible since the fund came into their possession for all proper care and management of the same. In defending these proceeds, therefore, against suits, instituted by third parties to recover them out of the hands of the executors, they have done no more nor no less than they were bound

to do as the proper guardians of the fund, if they had known at the time the relation in which they stood to it, and that they were defending it for the benefit of the estate of Williams, and not for that of Oliver. The services rendered and expenses borne could not have been dispensed with, consistent with their duties as trustees.

But it is said that these suits were defended by the executors while claiming the fund in right of their testator, and hence for the supposed benefit of his estate; that the defense was not made in their character of trustees, and cannot, therefore, be regarded as a ground for charging the estate of Williams with the costs of the litigation. The answer to this view is, that although in point of fact the defense was made under the supposition that the fund belonged to the estate of Oliver, yet in judgment of law it was made by them as trustees and not owners, as subsequently judicially ascertained; and as the costs and expenses were properly incurred in the protection and preservation of the fund, it is but just and equitable they should be made a charge upon it. The misapprehension as to the right cannot change the beneficial character of the expense, when indispensable to its security. The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned; and the expenses are properly chargeable in his accounts against the estate. 2 Story, Eq. Jur., § 1275.

Another principle which we think applicable to this case is to be found in a class of cases where a *bona fide* purchaser for a valuable consideration, without notice, has enhanced the value of the property by permanent expenditures, and has been subsequently evicted by the true owner on account of some latent infirmity in the title. It is well settled, if the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditures to be made, upon the principle that he who seeks equity must first do equity. 2 Story, Eq. Jur., §§ 799, 799b; 6 Paige, 403, 404; 1 Story Rep. 494, 495.

A kindred principle is also found in a class of cases where there has been a *bona fide* adverse possession of the property tacitly acquiesced in by the true owner. The practice of a court of equity in such cases does not permit an account of rents and profits to be carried back beyond the filing of the bill. 8 Wheat. 78; 27 E. L. & Eq. 212; 7 Ves. 541; 1 Edw. Ch. 579. This principle is applicable where the person in possession is a *bona fide* purchaser, and there has been some degree of remissness or negligence or inattention on the part of the true owner in the assertion of his rights.

Courts of equity, it would seem, do not grant active relief in favor of a *bona fide* purchaser making permanent meliorations and improvements, by sustaining a bill brought by him against the true owner, after he has succeeded in recovering the property at law. 6 Paige 390, 403, 404, 405; 1 Story R. 495; 8 Wheat. 81, 82. The civil law in this respect is more liberal, and provides a remedy in

behalf of the purchaser, even beyond an abatement of the rents and profits for such expenditures as have enhanced the value of the estate (cases above), and indeed generally applies the principle in favor of any *bona fide* possessor of property who has in good faith expended his money for its preservation or amelioration; otherwise, it is said, the true owner appropriates unjustly the property of another to himself. Touillier, 3 B., tit. 4, c. 1, ss. 19, 20.

Now in the case before us, Oliver in 1825 purchased this share in the Baltimore Company for the consideration of $2,000, its full value at the time. The purchase was made from the insolvent trustee of Williams, whom all parties concerned believed had the power to sell and transfer the title. Williams, down till his death in 1836, set up no claim to it; nor did his representative after his death, till August, 1852, when this bill was filed. Oliver and his executors had been in the undisturbed possession, so far as respects any claim under the present right, for the period of twenty-seven years. And although it may be said in excuse for any remissness, and by way of avoiding the consequences of delay, that Williams and those representing him had no knowledge of the defect in the title till the decision of the Court of Appeals of Maryland, it may be equally said, on the other hand, that Oliver and his executors were alike ignorant of it, and had in good faith expended their time and money in recovering the claim against the government of Mexico, and afterwards in defending it against a long and expensive litigation. It is difficult to present a stronger case for the protection of a *bona fide* purchaser from loss, who has expended time and money in enhancing the value of the subject of the purchase, or a case in which the principle more justly applies that where the true owner seeks the aid of a court of equity to enforce such a title, the court will administer that aid only when making compensation to the purchaser. We are therefore of opinion that the court below was right in allowing in the account the costs and fees paid to counsel by the executors in the defense of the suits.

In respect to the 35 per cent. allowed for the prosecution of the claim against the government of Mexico, it stands in principle upon the same footing as other services and expenses incurred in protecting and preserving the fund after possession was obtained. The amount of compensation depends upon the proofs in the case as to the value of the service, and which must in a good degree be governed by the usual and customary charges allowed for similar services and expenses. As this claim was prosecuted with others by Oliver when he supposed and believed that he was the owner, and that he was acting on his own behalf and not as trustee for Williams, the rate of compensation must rest upon all the facts and circumstances attending the service; there could have been no agreement as to the compensation. And for the same reason it cannot be expected that an account of the service and expenses was kept, so as to enable the court to arrive with exactness at the proper sum to be allowed, as might have been required if Oliver had been chargeable

with notice of the trust. The proofs show that Oliver appointed agents to represent him at the government of Mexico as early as March, 1825, and that these agencies were continued from thence down till his death in 1834; and that during all this time he kept up an active correspondence with them and others, and with our ministers at Mexico, and with his own government, on the subject. The justice of these claims had been acknowledged by the government of Mexico as early as 1823-24, but no provision was made for their payment. They were regarded as of very little value, from the hopelessness of their recovery; and it is perhaps not too much to say, upon the evidence, that in the absence of the vigorous and efficient prosecution of them by Oliver, they would have been worthless. In the result, for the share in question, which was sold in 1825 for $2,000, there was realized from the government of Mexico, under the treaty of 1839, the sum of $41,306.41. The estate of Williams has never expended a dollar towards recovering it, nor has Oliver ever received any compensation for his services. The amount may seem large, but we cannot say the court below was not warranted in allowing it, upon the proofs in the case of the great service rendered, and of the customary charges in similar cases. * * * *

Upon the whole, we are satisfied the decree of the court below was right, and ought to be affirmed.[1]

Mr. Justice GRIER dissented.

DILLON, J., IN PARSONS v. MOSES.

16 IOWA 440, 444.—1864.

BY the English and American common law, the true owner recovers his land in ejectment, without liability to pay for improvements, which may have been made upon it by an occupant without title. Improvements annexed to the freehold, the law deems part of it, and they pass with the recovery. Every occupant makes improvements at his peril, even if he acts under a *bona fide* belief of ownership. 2 Kent. Com. 334. Such is the rigid rule of the common law. It is founded upon the idea that the owner should not pay an intruder, or disseisor, or occupant, for improvements which he never authorized. It is supposed to be founded in good policy, inasmuch as it induces diligence in the examination of titles, and prevents intrusion upon and appropriations of the property of others.

[1]Accord, Lyons Bank v. Shuler, 199 N.Y. 405 (1910). In Williams v. Vanderbilt, 145 Ills. 238 (1893), the court says (p. 251): "When the true owner seeks relief in equity, as, for instance, to set aside a sale of land on which the improvements have been made, or to obtain an accounting for rents and profits, he may be required to make compensation for the improvements upon the principle that he who seeks equity must do equity."

Chancery, borrowing from the civil law, made the first innovation upon the common law doctrine. And it came at length to be held in equity, that when a *bona fide* possessor of property (for equity, no more than law, would aid a *mala fide* possessor) made meliorations and improvements upon it in good faith, and under an honest belief of ownership, and the real owner was for any reason compelled to come into a court of equity, that court applying the familiar maxim, that he who seeks equity must do equity, and adopting the civil law rule of natural equity, would compel him to pay for those improvements or industrial accessions, not the cost indeed, but so far as they were permanently *beneficial* to the estate, and enhanced its value. Story Eq. Jurisp. 799a, 799b; Putnam v. Ritchie, 6 Paige 390; Bright v. Boyd, 1 Story Rep. 478, enriched by the learning and research of that distinguished jurist; s. c. 2 Id. 605; Greene v. Biddle, 8 Wheat. 77; Willard's Eq. 312; Sugd. on Vend., chap. 22, §§ 54, 55, 57.

This was the extent of relief to *bona fide* possessors. "I have not," says Chancellor WALWORTH, in Putnam v. Ritchie, 6 Paige 390, "been able to find any case either in this country or in England, wherein the Court of Chancery has assumed to give relief to a *complainant* who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights."

Courts of law next modified the strict rule of the common law (which makes the occupant of land which is owned by another, no matter how good the faith of the occupant may be, liable for the rents and profits) to this extent, viz., that where such owner brought his action for mesne profits, which courts of law treated as an equitable action, the *bona fide* occupant might set off or recoup the value of his permanent improvements to the extent of the rents and profits demanded, but no further. Jackson v. Loomis, 4 Cow. 168;[1] Murray

[1] In Jackson v. Loomis, an action of trespass for mesne profits (the plaintiff having in a previous action of ejectment recovered possession of the premises), the defendant asked to be allowed the value of his improvements. The court held: "There is certainly no reason, in general, why the owner of land should be compelled to pay for improvements which he neither directed nor desired, as a condition on which he is to gain possession of his property. But when an occupant has taken possession under a *bona fide* purchase, and made permanent improvements, it is very hard for him to lose both land and improvements. If the plaintiff is not content with acquiring possession of his property in an improved condition, after he has neglected to assert his title for a number of years, it is certainly equitable that the defendant should be allowed the value of his improvements, made in good faith, to the extent of the rents and profits claimed. This view of the subject is fully supported by Green v. Biddle (8 Wheat. Rep. 81, 82), and the authorities there cited, especially Coulter's case (5 Co. Rep. 30). Most clearly the defendant should not be compelled to pay an enhanced rent in consequence of his own improvements." This rule is now substantially §1531 of the N. Y. Code Civ. Proc. Accord, Tongue v. Nutwell, 31 Md. 302 (1869). But in Putnam v. Tyler, 117 Pa. 570 (1888), which was an action of ejectment, without claim for damages or mesne profits, the court would not allow the innocent defendant the value of his improvements.

v. Governeur, 2 Johns. Cas. 438; Green v. Biddle, 8 Wheat. 1, 75, 76; 2 Kent 335, and cases in note; Putnam v. Ritchie, 6 Paige 404; Hilton v. Brown, 2 Wash. C. C. R. 165; Davis v. Smith, 5 Geo. 274.

The equity of the *bona fide* possessor who had made lasting and permanent improvements upon lands which turned out to be another's was so strong and persuasive as to force its recognition to this partial extent by courts of law, without the aid of statute.

Story, J., in BRIGHT v. BOYD.

1 Story 478, 494.—1841.

The other question, as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex aequo et bono,* I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, *Nemo debet locupletari ex alterius incommodo;* or, as it is still more exactly expressed in the Digest, *Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiorem.* Dig. lib. 50, tit. 17, l. 206. I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate; and thus to recoup them from the rents and profits. 2 Story, Eq. Jur., §§ 799a, 799b, 1237, 1238, 1239; Green v. Biddle, 8 Wheat. 77, 78, 79, 80, 81. So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. See also 2 Story, Eq. Jur., § 799b, and note; Id., §§ 1237, 1238. In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. *Ibid.*

But it has been supposed that courts of equity do not, and ought not, to go further, and to grant active relief in favor of such a

bona fide possessor making permanent meliorations and improvements, by sustaining a bill brought by him therefor against the true owner after he has recovered the premises at law. I find that Mr. Chancellor WALWORTH, in Putnam v. Ritchie, 6 Paige 390, 403, 404, 405, entertained this opinion, admitting at the same time that he could find no case in England or America where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just that in such a case the true owner should recover and possess the whole without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is that the moment the house is built it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest that the claim of the *bona fide* purchaser under such circumstances is founded in equity. I think it founded in the highest equity; and in this view of the matter I am supported by the positive dictates of the Roman law. * * * *[1]

[1] Later, in deciding this same case (in 2 Story 605, 607), the same judge says: "I have reflected a good deal upon the present subject; and the views expressed by me at the former hearing of this case, reported in 1 Story 478, *et seq.*, remain unchanged; or rather, to express myself more accurately, have been thereby strengthened and confirmed. My judgment is that the plaintiff is entitled to the full value of all the improvements and meliorations which he has made upon the estate, to the extent of the additional value which they have conferred upon the land. It appears by the Master's report that the present value of the land with the improvements and meliorations is $1,000; and that the present value of the land without these improvements and meliorations is but $25; so that in fact the value of the land is increased thereby $975. This latter sum, in my judgment, the plaintiff is entitled to, as a lien and charge on the land in its present condition. I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliora-

ISLE ROYALE MINING COMPANY v. JOHN HERTIN AND MICHAEL HERTIN.

37 Mich. 332.—1877.

Trover and *indebitatus assumpsit.*

Cooley, C. J.—The parties to this suit were owners of adjoining tracts of timbered lands. In the winter of 1873-74 defendants in error, who were plaintiffs in the court below, in consequence of a mistake respecting the actual location, went upon the lands of the mining company and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the wood was taken possession of by the mining company, and disposed of for its own purposes. The wood on the bank of the lake was worth $2.87½ per cord, and the value of the labor expended by plaintiffs in cutting and placing it there was $1.87½ per cord. It was not clearly shown that the mining company had knowledge of the cutting and hauling by the plaintiffs while it was in progress. After the mining company had taken possession of the wood, plaintiffs brought this suit. The declaration contains two special counts, the first of which appears to be a count in trover for the conversion of the wood. The second is as follows:

"And for that whereas also, the said plaintiff, Michael Hertin, was in the year 1874 and 1875, the owner in fee simple of certain lands in said county of Houghton, adjoining the lands of the said defendant, and the said plaintiffs were, during the years last aforesaid, engaged as co-partners in cutting, hauling, and selling wood from said lands of said Michael Hertin, and by mistake entered upon the lands of the said defendant, which lands adjoined the lands of the said plaintiff, Michael Hertin, and under the belief that said lands were the lands of the said plaintiff, Michael Hertin, cut and carried away therefrom a large amount of wood, to wit: one thousand cords, and piled the same upon the shore of Portage Lake, in said county of Houghton, and incurred great expense, and

tions, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation. The Betterment Acts (as they are commonly called) of the States of Massachusetts and Maine and of some other states are founded upon the like equity and were manifestly intended to support it, even in suits at law for the recovery of the estate."

Accord, Union Hall Assoc. v. Morrison, 39 Md. 281 (1873); Martin v. Atkinson, 7 Ga. 228 (1849). Approved, Hatcher v. Briggs, 6 Ore. 31 (1876). The reason for the few cases in accord "is doubtless found in the fact that the equities of bona fide purchasers of defective titles were so generally recognized as to result in statutes in most of the states, called 'betterment' or 'occupant' statutes which provide that a bona fide occupant, making lasting improvements in good faith shall have a lien upon the estate recovered by the true owner, to the extent that his improvements have enhanced the value of the land." Lurton, C. J., in Jones v. Hotel Co., 86 Fed. 370, 386 (1898), citing cases.

paid, laid out, and expended a large amount of money in and about cutting and splitting, hauling and piling said wood, to wit: the sum of two thousand dollars; and afterward, to wit: on the first day of June, A. D. 1875, in the county of Houghton aforesaid, the said defendant, with force and arms, and without any notice to or consent of said plaintiffs, seized the said wood and took the same from their possession and kept, used, and disposed of the same for its own use and purposes; and the said plaintiffs aver that the labor so as aforesaid done and performed by them, and the expense so as aforesaid incurred, laid out, and expended by them in cutting, splitting, hauling and piling said wood, amounting as aforesaid to the value of two thousand dollars, increased the value of said wood ten times and constituted the chief value thereof, by reason whereof the said defendant then and there became liable to pay to the said plaintiff the value of the labor so as aforesaid expended by them upon said wood and the expense so as aforesaid incurred, laid out, and expended by them in cutting, splitting, hauling, and piling said wood, to wit: the said sum of two thousand dollars; and being so liable, the said defendant in consideration thereof, afterward, to wit: on the same day and year last aforesaid and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay unto the said plaintiffs the said sum of two thousand dollars, and the interest thereon."

The circuit judge instructed the jury as follows:

"If you find that the plaintiffs cut the wood from defendant's land by mistake and without any wilful negligence or wrong, I then charge you that the plaintiffs are entitled to recover from the defendant the reasonable cost of cutting, hauling, and piling the same." This presents the only question it is necessary to consider on this record. The jury returned a verdict for the plaintiffs.

Some facts appear by the record which might perhaps have warranted the circuit judge in submitting to the jury the question whether the proper authorities of the mining company were not aware that the wood was being cut by the plaintiffs under an honest mistake as to their rights, and were not placed by that knowledge under obligation to notify the plaintiffs of their error. But as the case was put to the jury, the question presented by the record is a narrow question of law, which may be stated as follows: whether, where one in an honest mistake regarding his rights in good faith performs labor on the property of another, the benefit of which is appropriated by the owner, the person performing such labor is not entitled to be compensated therefor to the extent of the benefit received by the owner therefrom? The affirmative of this proposition the plaintiffs undertook to support, having first laid the foundation for it by showing the cutting of the wood under an honest mistake as to the location of their land, the taking possession of the wood afterward by the mining company, and its value in the condition in which it then was and where it was, as compared with its value standing in the woods.

We understand it to be admitted by the plaintiffs that no authority can be found in support of the proposition thus stated. It is conceded that at the common law when one thus goes upon the land of another on an assumption of ownership, though in perfect good faith and under honest mistake as to his rights, he may be held responsible as a trespasser. His good faith does not excuse him from the payment of damages, the law requiring him at his peril to ascertain what his rights are, and not to invade the possession, actual or constructive, of another. If he cannot thus protect himself from the payment of damages, still less, it would seem, can he establish in himself any affirmative rights, based upon his unlawful, though unintentional encroachment upon the rights of another. Such is unquestionably the rule of the common law, and such it is admitted to be.

It is said, however, that an exception to this rule is admitted under certain circumstances, and that a trespasser is even permitted to make title in himself to the property of another, where in good faith he has expended his own labor upon it, under circumstances which would render it grossly unjust to permit the other party to appropriate the benefit of such labor. The doctrine here invoked is the familiar one of title by accession, and though it is not claimed that the present case is strictly within it, it is insisted that it is within its equity, and that there would be no departure from settled principles in giving these plaintiffs the benefit of it.

The doctrine of title by accession is in the common law as old as the law itself, and was previously known in other systems. Its general principles may therefore be assumed to be well settled. A wilful trespasser who expends his money or labor upon the property of another, no matter to what extent, will acquire no property therein, but the owner may reclaim it so long as its identity is not changed by conversion into some new product. Indeed some authorities hold that it may be followed even after its identity is lost in a new product; that grapes may be reclaimed after they have been converted into wine, and grain in the form of distilled liquors. Silsbury v. McCoon, 3 N. Y. 379. See Riddle v. Driver, 12 Ala. 590. And while other authorities refuse to go so far, it is on all hands conceded that where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title of the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property

is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than Wetherbee v. Green, 22 Mich. 311, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of $25, and converted them into hoops worth $700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in Wetherbee v. Green. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed as a rule that a man prefers his trees cut into cord wood rather than left standing, and if his right to leave them uncut is interfered with even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others, if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment and receives his remuneration; while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

A case could seldom arise in which the claim to compensation could be more favorably presented by the facts than it is in this; since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by its operation in an individual case, but by its general workings. If a mechanic employed to alter over one man's dwelling-house, shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a large expenditure of labor shall thoroughly overhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or if he takes possession, must pay for labor expended upon it which he neither contracted for, desired, nor consented to? And

if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next be demanding payment for the transportation; and the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin.

The judgment of the circuit court must be reversed, with costs and a new trial ordered.

The other justices concurred.[1]

6. PERFORMANCE OF A WRITTEN CONTRACT, THE CONTRACT BEING FOUNDED ON MISTAKE.

BOYCE v. WILSON.

32 MD. 122.—1869.

MAULSBY, J.—This action is to recover money paid by mistake under a count for money had and received. At the trial the plaintiff offered two prayers which were rejected, and the court granted the following prayer of the defendant: "That there is no sufficient evidence to show such a mistake in the contract of April 15, 1864, and the deed of Wilson to Boyce and Rieman, as will entitle the plaintiff to recover in this action," and the plaintiff appealed.

[1] "The Supreme Court of North Carolina, in Gaskins v. Davis, 20 S. E. R. 188 [115 N. C. 85 (1894)], decides that one who cuts logs on another's land by mistake cannot, when they are retaken by the lawful owner, claim compensation for their increase in value caused by his having transported them to market. The action was by the lawful owner for damages for cutting other logs, and defendant sought to counter-claim. Had the mistaken wrongdoer sufficiently changed the nature or enhanced the value of the logs to acquire title to them by accession, the measure of damages would have been limited to the value of the logs at the time of the conversion. The same rule would have applied in many jurisdictions if there had been no accession, and the real owner had brought trover for the logs instead of retaking them. In both cases defendant would, in effect, have been compensated for the increase in value which his labor had brought about. It seems unfortunate that in the single case where there has been no accession, and the logs are retaken by the owner, the right to compensation should be denied. In Isle Royale Mining Co. v. Hertin, 37 Mich. 332, a similar log case, the claim was denied because to allow it would be to offer a 'premium to heedlessness and blunders.' The rule of damages in accession and trover seems equally lenient to blunderers, and has not been found disastrous in practice. It is rather difficult to distinguish the cases on principle from those in which a right to compensation in equity has been allowed for improvements to land made under a mistaken belief of ownership (Albea v. Griffin, 2 Dev. & B. Eq. 9 (N. C.); Rodman, J., in Potter v. Mardre, 74 N. C. 40). A decision to much the same effect was made in Bright v. Boyd, 1 Story 478; 2 Story 608, and see Keener, Quasi-Contracts, 385, 386. The analogy was noticed by the court in the principal case."—Note in 8 *Harvard Law Review,* 356. See also Willis, "Damages When Property is Wrongfully Taken by a Private Individual," 22 *Harvard Law Review,* 419, 424; Trustees of Dartmouth College v. Paper Co., 132 Fed. 92 (1904).

In the view which we take of the case, we do not deem it material to determine whether the defendant's prayer, in the terms used, was properly granted or not. The contract offered in evidence by the plaintiff is a written contract, in which the consideration expressed is $90,322, and that sum was paid by appellant to appellee. The ground of the appellant in this suit is that the consideration, which ought to have been expressed in the written contract, was $81,250, and that he paid $9,072 too much, by reason of the fact that the written contract did not contain the true contract between the parties to it.

He was permitted by the court below to offer parol evidence, and to prove that the written contract was *intended* to embody a verbal agreement previously made. His counsel asked him, testifying as a witness, "what the agreement was which resulted in the written contract, and whether there was any mistake in the amount of consideration stated in the contract?" And again, whether the consideration stated in the written contract "was the true consideration for the property agreed to be conveyed," or whether there was any mistake, and if so, what it was, and how it arose? The witness replied, in substance, that he and the appellee had agreed by parol that he was to purchase from the appellee certain real estate, and mining stocks, at certain valuations, and that, after negotiating for some time, they finally made a calculation of the amount which he was to pay for the same, and that the sum ascertained by the calculation was $90,322, that afterward the agreement was reduced to writing, and embodied that sum as the consideration, and that the contract offered in evidence was that writing, and when it was executed he was not aware that the said sum was not the correct consideration, but that some time afterward he discovered that the calculation had been made on an erroneous basis, and that the sum which ought to have been expressed in the written contract was $81,250, that before this discovery was made by him the real estate and stocks had been conveyed and transferred to him, and he had paid the full sum mentioned in the written contract. The alleged mistake was in the calculation made before the written contract, and was carried into that contract.

Can the parol evidence vary the written contract, by striking therefrom the consideration expressed in it, and inserting in its stead another reduced consideration? The plaintiff has made no mistake which a court of law can correct, if he has paid only that sum which his contract obliged him to pay. He cannot recover at law a sum paid by mistake, unless that sum were over and above what he had contracted to pay. * * * * The written contract may not have been in accordance with the intention of the parties. It may have expressed, by mistake, one consideration, when the real intention out of mind at the moment of its execution was that it should have expressed another. But, whatever may have been the mistake, or how produced, it can find no recognition until the written contract shall have been reformed and made to conform to the inten-

tion of the parties, and this a court of law cannot effect. A court of equity alone can reform a written contract.

When the court of appeals, in Murphy v. Barron, 1 Harris & Gill 258, said, "the action for money had and received is an equitable action, and equally as remedial in its effects as a bill in equity," it did not mean to be understood as obliterating any of the well-defined lines of demarcation which separate the jurisdiction of courts of law and equity. It did not mean that an action of *assumpsit* can be founded on anything else than contract, express or implied. It meant only, that contracts to repay money received, through fraud or mistake, would be implied, in a spirit of liberal and generous justice, when the rigid rules of law did not forbid. The illustrations put, in the court's opinion, explain it. As, "where money has been paid on a consideration which has failed." "That the extending those actions depends on the notion of fraud." "If a man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the election of the party injured either to affirm the agreement by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use." But the court did not intend to say that, in this action, settled rules of law could be abrogated; that a written contract could be shown, by parol, to be different from the import of its terms, or that the rules regulating the force and effect of evidence could be interfered with or altered.[1]

The result from these views being that the plaintiff cannot recover in a court of law, it is not material to determine whether or not the prayer, as offered, was properly granted, because, even if it were erroneous, the appellant has sustained no injury. He could derive no benefit from a reversal, and to order a new trial would be nugatory, because he could not recover.

Under the views expressed, the plaintiff's prayers were properly rejected. Therefore, this court will not reverse the judgment.

Judgment affirmed.

HOWES v. BARKER.

3 JOHNS. (N. Y.) 506.—1808.

THIS was an action of assumpsit. The declaration contained three counts. 1. For money had and received to the use of the plaintiff. 2. For money paid out and expended. 3. For money lent and advanced. The defendant pleaded *non assumpsit*. The cause was tried before Mr. Justice THOMPSON, at the Dutchess circuit, in September, 1807.

The plaintiff's counsel, on opening the cause to the jury, stated,

[1] But see Minchin v. Minchin, reported herein at post p. 640.

that the plaintiff and defendant, on the 20th of August, 1798, executed articles of agreement, under their hands and seals, by which the defendant agreed to sell and convey to the plaintiff, for the sum of nine pounds per acre, a certain parcel of land, mentioned in the agreement, and covenanted to execute a good warranty deed for the same, on or before the 1st day of April following, on the plaintiff's paying him for the land, at the terms agreed upon; that the defendant, afterward, on the 1st of April, 1799, executed a deed to the plaintiff, in the usual form, and with the usual covenants, in which the premises conveyed were described as containing 275 acres, exclusive of any allowance for highways, and the plaintiff paid to the defendant $6,187.50, being the price of 275 acres at £9 per acre; that the premises mentioned in the agreement, and described and conveyed in the deed, were afterwards found to contain only 263 acres, there being a deficiency of twelve acres; by means of which deficiency in the supposed quantity of the land the defendant had paid by mistake $270 over and above the value of the land, at the rate agreed to be paid for the same; to recover which sum, with the interest thereon, the present action was brought. Upon this statement of the case, the defendant moved for a non-suit, on the ground that the action was not maintainable, and the judge was of opinion, on the facts disclosed, that no action could be sustained.

The plaintiff then offered to prove that at the time the deed was executed, the defendant agreed with the plaintiff, that the quantity of acres conveyed should be the subject of future inquiry, and that the sum paid should be rectified by the actual quantity of land; but this evidence was overruled by the judge.

The plaintiff then offered to prove that the defendant, after the execution of the deed, had acknowledged the mistake and had promised to refund the money, so received by mistake, and for that purpose produced a letter written by the defendant to the plaintiff, which was admitted and read, in which he says, "I will come down next week, and early enough in the day to send for Mr. Baldwin. All I want is to be convinced of the quantity of land, and Baldwin says he can do it." The judge being of opinion that neither the facts stated, nor the evidence produced, were sufficient to support the action, ordered the plaintiff to be called and a non-suit was accordingly entered.

A motion was afterward made to set aside the non-suit.

THOMPSON, J.—Could the plaintiff's action in this case be sustained at law without infringing upon what I consider well-settled principles, I should think the non-suit ought to be set aside; for if the facts offered to be proved were true there has been a mistake made in the deed, which ought to be rectified. But relief in my opinion is not to be had in a court of law. There is no pretense of any fraud having been practiced upon the plaintiff. The most that can be alleged is, that there has been a mistake with respect to the insertion of the consideration-money in the deed. The contract between the parties, according to the articles of agreement, was *execu-*

tory, and having been executed and consummated by the deed subsequently given, the agreement became null and of no further effect. If it remained in force, the action, if at all sustainable, should have been upon the covenant. This is not like the case of Weaver v. Bentley (1 Caines 48). The court there sustained the action for money had and received, on the ground that the defendant having altogether failed to perform the contract, on his part, the plaintiff had his election, either to proceed on his covenant for damages, or to *disaffirm* the contract, and to bring his action to recover back the money he had paid. The present case, however, is not one where the plaintiff claims the right of disaffirming the contract, but has consummated it by the acceptance of a deed. The deed cannot be considered as an execution of the contract in part only. If an execution at all, it must be of the whole contract, and the articles of agreement are a nullity. If so, the testimony offered in support of the plaintiff's action, to show that the consideration expressed in the deed was more than ought to have been paid, could be viewed in no other light than as parol evidence, repugnant to the written contract. That such testimony is not admissible, has been repeatedly ruled in this court. 2 Caines 161; 1 Johns. Rep. 418. The language of the court, in those cases was, that it cannot be a safe or salutary rule, to allow a contract to rest partly in writing, and partly in parol. Whenever it is reduced to writing, that is to be considered the evidence of the agreement, and everything resting in parol becomes thereby extinguished. I cannot perceive why any parol agreement, varying the consideration-money expressed in the deed, does not fall within this rule, as much as if it related to any other part of the contract. There is, however, an express adjudication of this court on that point, in the case of Schermerhorn v. Vanderheyden, 1 Johns. Rep. 140. The court there say: "The *consideration* for the assignment is expressly stated in the deed of assignment itself, and the parties are thereby precluded from setting up any greater or different consideration. To allow of parol evidence for that purpose, would be to extend, or substantially vary, the language of a written contract. Though the promise in question may have been made previously to the assignment, yet after the execution of the instrument, we must presume that the father and son altered the consideration mentioned at first, and finally acted upon that which is set forth in the assignment." So in the case before us, we must presume, after the execution of the deed, that the consideration therein mentioned was the one finally agreed on between the parties. The testimony offered to show an agreement, at the time the deed was executed, to have the land surveyed and the price regulated by that survey, was properly rejected as coming within the principle adopted by this court in the case of Mumford v. M'Pherson, 1 Johns. Rep. 414. See also Bradley v. Blodget, Kirby's Rep. 22. The plaintiff was permitted on the trial to adduce testimony to show that the defendant had, after the execution of the deed,

acknowledged the mistake and promised to refund the money, but he altogether failed in establishing such a promise.

Whatever view, therefore, is taken of the case, I think the non-suit ought to stand; and that the present motion must be denied.

SPENCER, J., was of the same opinion.

KENT, CH. J.—I am of the same opinion. I confess that I have struggled hard, and with the strongest inclination, to see if the action for *money had and received* would not help the plaintiff in this case; but I cannot surmount the impediment of the *deed*, which the plaintiff has accepted from the defendant, and which contains a specific consideration in money, and the quantity of acres conveyed, with the usual covenant of seisin. Sitting in a court of law, I think I am bound to look to that deed as the highest evidence of the final agreement of the parties, both as to the quantity of the land to be conveyed, and the price to be given for it. If there be a *mistake* in the deed the plaintiff must resort to a court of equity, which has had a long established jurisdiction in all such cases; and where even parol evidence is held to be admissible to correct the mistake. 1 Vesey 317; 3 Bro. C. C. 454; 5 Vesey, jun. 595, 596; 6 Vesey, jun. 333, 334. The motion to set aside the non-suit must be denied.

VAN NESS, J., having formerly been concerned as counsel in the cause, gave no opinion.

YATES, J., not having heard the argument in the cause, gave no opinion.

Judgment of non-suit.[1]

[1] But see Wilson v. Randall, 67 N. Y. 338 (1876); Armour v. Sound Shore Co., 159 N. Y. App. Div 213 (1913).

In Houghtaling v. Lewis, 10 Johns. 296, 298 (1813), the court says: "Articles of agreement for the conveyance of land are, in their nature, executory, and the acceptance of a deed, in pursuance thereof, is to be deemed, *prima facie,* an execution of the contract, and the agreement thereby becomes void, and of no further effect. Parties may, no doubt, enter into covenants collateral to the deed, or cases may be supposed when the deed would be deemed only a part execution of the contract, if the provisions in the two instruments clearly manifested such to have been the intention of the parties. But the *prima facie* presumption of law arising from the acceptance of a deed, is that it is an execution of the whole contract; and the rights and remedies of the parties, in relation to such contract, are to be determined by such deed, and the original agreement becomes null and void."

Recovery at law because of a deficiency in the amount of land was allowed upon the principle of the cases stated suppositively in the preceding paragraph, in Witbeck v. Waine, 16 N. Y. 532 (1858), and Murdock v. Gilchrist, 52 N. Y. 242 (1873). In Paine v. Upton, 87 N. Y. 327 (1882), a suit in equity was brought to obtain a deduction from the sum secured by a bond and mortgage, given for a portion of the purchase price of a farm, on the ground of a deficiency in and mutual mistake as to the quantity of land; and although the contract had been executed and the deed given, the relief was granted, the court saying, however, that the power of equity to annul or reform executed transactions "should be exercised with great caution."

WILLIAMS v. HATHAWAY.

19 Pick. (Mass.) 387.—1837.

Assumpsit to recover back money paid to the defendant by the plaintiff on the purchase of certain land. At the trial, in the common pleas, before Williams, J., it appeared that the parcel of land in question, which originally belonged to the defendant, was offered for sale by public auction, on the 20th of April, 1827, it being estimated and represented to contain fifteen acres; that it was struck off to the plaintiff for $5.05 by the acre, on that estimate; that the deed of the land from the defendant set forth, that, in consideration of the sum of $75.75, paid him by the plaintiff, he thereby conveyed to the plaintiff the land in question, "containing fifteen acres," described by metes and bounds; that there was no agreement at the time of the sale or of the execution of the deed, that the land should be measured for the purpose of ascertaining the quantity; and that by an admeasurement made in January, 1837, it fell short of the estimate by one acre and fifty-five rods. It further appeared, that, in 1832, the defendant said, that if the land did not hold out the fifteen acres, he would make it right. The judge, being of opinion that the action could not be sustained, ordered a non-suit to be entered. The plaintiff thereupon excepted.

Per Curiam.—By the deed, which is made part of this case, it appears that the plaintiff paid a certain sum of money for the whole land described and identified; and by the rules of law, when a deed is executed in pursuance of a contract for the sale of land, all prior proposals and stipulations are merged, and the deed is deemed to express the final and entire contract between the parties. If the purchaser was not satisfied that the tract contained so large a quantity as it was estimated at he should have had it measured before he took his deed and made his payment. It must not be understood, from the deed, either that it was in fact measured, or that the parties were content to estimate it at fifteen acres, and settle at that rate, whether more or less. And if the tract described had contained more than fifteen acres, there is no doubt that it would have passed by the deed, and the grantor would have had no remedy for the excess; the deed would be as conclusive upon him, as we think it now is on the plaintiff. As to the defendant having said that if the land did not hold out fifteen acres he would make it right, it can hardly be deemed a promise, not being said to the plaintiff; but if it was, it was made upon no legal consideration, and was not, therefore, the ground of an action.

Exceptions overruled and the judgment of C. C. P. affirmed.[1]

[1] Contra, if the area is not merely estimated, but is computed, and there is a mistake in the computation. Cardinal v. Hadley, 158 Mass. 352 (1893).

KREITER v. BOMBERGER.

82 PA. ST. 59.—1876.

ASSUMPSIT, brought by J. M. Kreiter, against I. F. Bomberger. One defense was by way of set-off and was "that Kreiter had sold Bomberger a piece of ground in Warwick village, containing, as represented by Kreiter in the deed, 242 feet 4 inches front, and in depth 200 feet, containing one acre and a half, more or less, which upon actual measurement contained 52 feet 8 inches less in front, the deficiency extending through its entire length, reducing the area to less than an acre, for which he paid $6,000, and claimed damages for the deficiency. It was a sale consummated by payment, delivery of deed, and possession of the vendee under it." The jury allowed the set-off of damages for deficiency of land, reducing the verdict from $6,769.24, as it would have been upon the first finding, to $215.59, for which amount they gave a verdict for the plaintiff.

MR. JUSTICE SHARSWOOD.—* * * * The right of a vendee to be allowed to recover for an alleged deficiency in the quantity of land purchased by him, as described in his deed or articles of agreement, may arise in three different classes of cases.

The first is when the agreement is entirely executory. I cannot find in our books any case in point, but in most of those which have been decided where the agreement has been carried out by a conveyance, and the giving of securities for the purchase-money, so much stress is laid upon the execution of the deed as to produce the impression that a vendee, where the articles are entirely executory, would be allowed for any considerable falling off in the quantity.[1] Chief Justice TILGHMAN declined to express any opinion upon the question in Smith v. Evans, 6 Binn. 102. As the action to recover the purchase-money may be regarded as equivalent to a bill in equity to enforce the specific performance of the contract, it may well be concluded that the vendee ought not to be compelled to pay

[1] "Plaintiff contracted to purchase from defendant a parcel of land, at a certain price per acre, subject to measurement, and to pay for the same in certain installments, defendant agreeing to convey to him after such payments. In pursuance of the contract, the land was surveyed by a land surveyor, who reported the number of acres, and plaintiff paid accordingly, both parties supposing the number of acres to be that reported by the surveyor. Plaintiff entered into and took possession of the land pursuant to the contract, but without having received a conveyance thereof, and sold the same to a third party. After this sale a resurvey was made, and the number of acres ascertained to be less than that supposed at the time the payments were made; also that the description differed from that given on the former survey.—*Held*, in an action brought for that purpose, that the plaintiff could recover, on the ground of a mutual mistake of facts by the parties, the amount which he had overpaid the defendant, and was entitled to a deed containing a description of the land according to its true boundaries, and stating the actual number of acres."—George v. Tallman, 5 Lans. (N. Y.) 392 (1871), syllabus.

for more land than he actually receives, unless it appears that he understood and meant to take the risk that the quantity was as represented. The case is much plainer when the agreement is at the price of so much per acre; and even where it is for a round sum, and the quantity is qualified by the words "more or less," the deficiency should be a reasonable one, as in the old case of Day v. Finn, Owen 133, cited in 9 Vin. Abr. 343, pl. 10, where it is held that "sive plus sive minus" shall be intended of a reasonable quantity. Certainly very much ought to depend upon the extent of the purchase and the value of the land. This, however, is not the case which we have before us, and we do not intend to express an opinion upon it.

The second class of cases is however the more usual one: namely, where the contract has been carried out by the execution of a deed and of bonds or other securities for the purchase-money. The question has there arisen upon actions to recover on these securities. In such cases the law is well settled, that where the contract was for a round sum, or even by the acre, the vendee will not be allowed for a deficiency in the quantity, where the number of acres in the deed is stated with the qualification *more or less,* unless there be fraud, or, as is said, the difference is so very great as to show an evident mistake. The rule was stated by Mr. Justice SERGEANT, in Galbraith v. Galbraith, 6 Watts 112, in these words: "An examination of the numerous decided cases in our own reports will, I think, show that in the common case between vendor and vendee, in a conveyance of a tract of land bounded by adjoining owners, and described as containing so many acres, *be the same more or less,* at a certain price per acre, where there is no stipulation for admeasurement nor any *mala fides* proved, redress cannot, after the bargain is closed, be given to either party for a surplus or deficiency subsequently appearing." This rule was adopted and confirmed in Hershey v. Keemborts, 6 Barr 128; Chief Justice GIBSON adding, "The vendor is answerable in respect of the quantity only for *mala fides.*" There are indeed many dicta that the difference in the quantity may be so great as to be evidence itself of fraud or deceit, or of great misapprehension between the parties, and then equity will relieve. Though no case is to be found of an actual application of this doctrine in favor of the vendee, or to show what must be the extent of the difference to raise the presumption, yet perhaps it may be fairly conceded, that in an action to enforce the payment of purchase-money, a deduction under such circumstances will be allowed. Such is the weight of extra judicial opinions: Boar v. McCormick, 1 S. & R. 166; Glen v. Glen, 4 Id. 488; Bailey v. Snyder, 13 Id. 160; McDowell v. Cooper, 14 Id. 296; Ashcom v. Smith, 2 Penna. R. 219; Frederick v. Campbell, 13 S. & R. 136; Haggerty v. Fagan, 2 Penna. R. 533; Coughenour's Adm'rs v. Stauft, 27 P. F. Smith 191.

The third class of cases to which the one now under consideration belongs, is where the contract is fully executed and the purchase-money paid. We are of the opinion that in this class, the transaction

cannot be ripped up, without actual proof of fraud or mutual mistake. Upon this question the greatness of the difference may be evidence, but not sufficient of itself. There must be other circumstances. Cases of this class very rarely arise. I can find but one instance in our books. That is the case of Large v. Penn, 6 S. & R. 488. There the difference was very great in reference to the extent of the premises. The quantity conveyed was described as 2¾ acres, and without the words "more or less;" the actual quantity was, 1 acre, 148 perches. Yet the vendee was denied relief; Chief Justice TILGHMAN remarking: "It is the boundaries to which the grantee must look; he has a right to all the land within them. The quantity is a matter of calculation, and, be it more or less, passes. There is no express covenant that the quantity in this case shall amount to 2¾ acres. Nor is there any implied covenant, because the quantity is introduced not by way of covenant, but of description." So in Smith v. Evans, 6 Binn. 102, which was a proceeding on a mortgage, to recover unpaid purchase-money, where upon a conveyance of 991¼ acres, more or less, the quantity fell short 88 acres, 48 perches, and the vendee was refused relief; Mr. Justice YEATES, in his dissenting opinion, says: "And yet I freely confess that if, under this state of facts, the whole money had been paid, and the transaction closed, I know of no legal mode whereby any of the money could be recovered back." This distinction between cases where the purchase-money has been fully paid and the demand is to recover back part, and cases where the vendor is proceeding upon his securities to enforce full payment, is well sustained by the general principles upon which courts of equity proceed. They will not rescind a contract fully executed without clear proof of fraud or mutual mistake in an essential point. They proceed upon different principles in the enforcement of contracts.

It follows that there was error committed by the learned judge below in admitting and submitting to the jury the deed from Kreiter to Bomberger, as in itself sufficient evidence of fraud or mistake, if they should think the difference very great. If it was sufficient of itself, it was a question of law for the court and not of fact for the jury. There was no evidence besides the deed to show fraud in Kreiter or mutual mistake of the parties. The vendee was well acquainted with the lot, within the boundaries described in the deed. That was the lot he bought. There was no representation by the vendor of the quantity of acres it contained. The description in the deed was most probably copied from the prior conveyances to him recited in it. Both parties made and concluded the bargain with their eyes open. The vendee threw out no anchor to windward as to quantity as he did as to title by his covenant of general warranty. If within any period short of six years from the time of the transaction, a contract of purchase and sale, fully executed by delivery of the deed and payment of the purchase-money, can be overhauled and materially changed, very disastrous consequences will ensue not only to vendors called upon to refund what

they had every reason to believe was their own and had a right to deal with accordingly, but to the public at large, by sowing the seeds of an abundant crop of lawsuits.

Judgment reversed and *venire facias de novo* awarded.

WHITE v. MILLER.

22 Vt. 380.—1850.

Indebitatus assumpsit for money had and received. On trial the plaintiff proved by parol testimony, which was objected to by the defendant but admitted by the court, that in September, 1844, he contracted with the defendant to purchase and did purchase of him an irregularly shaped piece of land, at the price of $25 per acre,— the quantity of land being unknown to the parties; that the plaintiff and defendant went together, and, with leading lines, measured the lines of the land, and the defendant computed the contents and made the same amount to $5\frac{3}{4}$ acres; that at the same time, and immediately after the defendant's computation, a third person, not a surveyor, at the request of the plaintiff, computed the contents, from the defendant's minutes, as the defendant had done, and with the same result; that in both computations an error occurred of $1\frac{1}{4}$ acre,— the land, when correctly computed, amounting to only $4\frac{1}{2}$ acres; and that both parties being ignorant of the mistake in the computation, the plaintiff paid to the defendant $143.75, the price of $5\frac{3}{4}$ acres at $25 per acre, and the defendant executed to the plaintiff a deed of the land, and the plaintiff went into possession, and still continues in possession. The deed, which on notice by the defendant was produced by the plaintiff, was a deed with covenants of warranty, in common form, acknowledging the receipt of $142 as the consideration, and describing the land as being bounded on certain other lands, without giving courses, or distances,—the description concluding with these words,—"the same containing about $5\frac{3}{4}$ acres, be the same more or less." The court charged the jury, that upon the evidence, if believed, the plaintiff would be entitled to recover; and the jury returned a verdict in his favor for the amount of the deficiency in the land, at $25 per acre. Exceptions by defendant.

Hall, J.—The first and most important objection, that is made to the verdict is, that the parol testimony was improperly admitted, for the alleged reason, that the whole contract between the parties was merged in the deed and could not otherwise be shown than by the deed itself.

How far a contract for the purchase and sale of land is to be considered as being embraced and controlled by the terms of the deed

is a question, upon which the authorities are to some extent contradictory and irreconcilable. In England the recital of the payment of the consideration money in a deed of conveyance is regarded as conclusive evidence of payment, binding the parties by estoppel; and to that effect are some of the earlier cases in this country. But the American courts now generally treat the recital of the receipt of the consideration as only *prima facie* evidence of the amount paid; and as subject to explanation, by showing, by parol, that nothing in reality had been paid, but that the sum agreed upon as the consideration for the conveyance was still due and unpaid. This is the undoubted law of this state. Beach v. Packard, 10 Vt. 96; Lazell v. Lazell, 12 Vt. 443. The recital in the deed is not, however, much relied upon as an obstacle to the introduction of the parol testimony in this case. But it is insisted, that the conclusion of the description of the land in the deed,—"the same containing about 5¾ acres, be the same more or less,"—is to be taken as conclusive evidence, that, at the final consummation of the contract, the plaintiff agreed to accept the land, and to pay the consideration for it, without reference to the quantity it contained,—that, having received the land *for more or less,* without reference to the quantity, he cannot now be permitted to show that the contract was for a certain number of acres, and that the quantity turned out to be less than was contracted for. The question in regard to the effect of a recital of this description, in a deed, upon the contract of purchase and sale, is one of considerable difficulty, and one which does not appear to be controlled by positive authority. The reason why the recital of the receipt of the consideration in the deed is not now held to be conclusive is, that the object of inserting the consideration is to give effect to the conveyance, as a legal instrument, and not to specify the contract in regard to the price paid, or to be paid, or the fact or mode of payment. The receipt of the consideration being acknowledged for one purpose, it is held to be unjust to allow it to conclude a party upon another matter, not contemplated by its insertion.

Was the statement, in the present case, of the quantity of land in the deed, with the qualification of *more or less* added to it, designed as a recital of the contract, that had been made between the parties in regard to the price to be paid, or was it merely intended as part of the description of the land to be conveyed? It has long been held, that the statement of a *precise* quantity of land, as conveyed by a deed, does not bind the grantor to make good that quantity. Thus, it was held in Beach v. Stearns *et ux.*, 1 Aik. 325, that the words "containing thirty-four acres and nineteen rods of ground," in a deed, added to a description of the land by metes and bounds, did not import an agreement, that the land should hold out that quantity. And in Powell v. Clark, 5 Mass. 355, the still stronger words—"the lot to contain two hundred acres by measure"—following a

similar description of the land, were held to be alike inoperative against the grantor. The reason given, why such words—of a sufficiently affirmative character to import a covenant—should not be construed as such, is, that they were not inserted for the purpose of declaring what the contract had been between the parties in regard to the quantity of land, but merely as a part of the description of the land designed to be conveyed. If words thus made use of, positively declaring the conveyance of a precise quantity of land, are not evidence against the grantor that he had sold that quantity, it is difficult to perceive why words which merely import that the quantity may be uncertain should be conclusive proof against the grantee that he had purchased and agreed to pay for the land, without reference to the quantity. If the language is merely descriptive of the land, when the quantity is stated as certain, it would seem to be equally so when the quantity is stated to be uncertain.

The purpose for which the deed is made is not to state the contract between the parties in regard to the terms of the purchase, *but to pass the title to the land.* The deed is not, strictly speaking, an agreement between the grantor and the grantee. It is executed by the grantor alone, and is a declaration by him, addressed to all mankind, informing them that he thereby conveys to the grantee the land therein described. The object *is to pass the title,*—not to declare the terms upon which the land had been sold and the mode in which the payment was to be made. And in declaring that the land described contains about so many acres, more or less, the grantor merely says, that the land included within the boundaries before stated shall pass to the grantee, whatever may be the quantity—whether it be more or less than the quantity stated. It would be a forced construction of such language, thus used, to hold that the grantor intended thereby to make any declaration in regard to the particular terms of the purchase, or the mode by which the price to be paid for the land had been arrived at between the parties.

It is not intended to say that the terms of a contract of sale may not be recited in the deed; and when the design to do so is apparent, effect should doubtless be given to the recital. But when the language of the deed, as in the present case, is general, and the words used may have their full force, as descriptive of the land, we think they should not be construed to conclude the parties in regard to the terms of the contract.

It is not to be denied that it would be difficult to reconcile some of the authorities cited in the argument with the conclusion to which we have come, and upon what I considered to be the weight of authority, I was at first inclined to hold that the parol testimony should have been excluded. But on farther consideration and reflection I have become satisfied that the view we have taken is founded on the true nature and object of a deed of conveyance,—especially a conveyance by deed poll, and that any other rule than that we adopt would give an effect to the instrument not con-

templated by the parties to do, and would consequently operate unjustly. We are therefore of opinion that the contract proved by parol is not to be considered as having been merged in the deed, and that the evidence was properly admitted.

It is farther objected in behalf of the defendant that the facts proved were insufficient to authorize a recovery. It is said that the parties having each an opportunity of ascertaining the quantity of the land, and there being no fraud in the case, the principle of *caveat emptor* applies, and that the plaintiff is to be considered as having taken the land, in regard to the quantity, at his own risk. It is undoubtedly a general rule of law, well settled in this State, that in the absence of fraud and warranty the purchaser takes the property at his own risk, as it regards its *quality*, and where the *quantity* is made the subject of estimation only, a similar rule would probably apply. But when the quantity of the thing purchased is agreed to be ascertained by count, weight, or measure, and there is an error in the count, weight, or measure, such error must be a proper subject of correction. In the present case the price to be paid was to be determined by the quantity of the land, and the error appears to have been one of mere computation. It would seem, from the bill of exceptions, that the lines of the land were rightly measured, but the quantity erroneously computed. The parties were under a mutual mistake, by reason of which a greater amount of money was paid to the defendant than he was entitled to by the contract. The excess, above that which the defendant was to receive by the contract, belongs in equity and good conscience to the plaintiff, and we think he may well recover it in this action.

It may be added, in reference to another objection made in argument, that this is not a case in which it was necessary for the plaintiff to rescind the contract, or to offer to rescind it, before bringing the action; because when the money is recovered the parties will be left in the precise situation in which they were to be placed by the contract. Johnson v. Johnson, 3 B. & P. 162; Miner v. Bradley, 22 Pick. 460.

The result is that the judgment of the county court is to be affirmed.

7. MISTAKE AS TO NEGOTIABLE INSTRUMENTS.

PRICE v. NEAL.

3 BURR. (K. B.) 1354—1762.

ACTION upon the case brought by Price against Neal, wherein Price declares that the defendant Edward Neal was indebted to him in £80 for money had and received to his the plaintiff's use; and damages were laid to £100. The general issue was pleaded, and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows:— "Leicester, 22d November, 1760. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received, for Mr. Thomas Poughfor; as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." Indorsed "R. Ruding, Antony Topham, Hammond, and Laroche. Received the contents, James Watson and Son; witness Edward Neal." That this bill was indorsed to the defendant for a valuable consideration, and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40 and take up the said bill; which was done accordingly.

That another bill was drawn as follows: "Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received, for Mr. Thomas Ploughfor, as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." That this bill was indorsed, "R. Ruding, Thomas Watson and Son. Witness for Smith, Right and Co." That the plaintiff accepted this bill, by writing on it, "Accepted, John Price;" and that the plaintiff wrote on the back of it: "Messieurs Freame and Barclay, pray pay forty pounds for John Price." That this bill being so accepted was indorsed to the defendant for a valuable consideration, and left at his banker's for payment; and was paid by order of the plaintiff and taken up.

Both these bills were forged by one Lee. Defendant Neal acted innocently and paid the whole value of these bills. Verdict for the plaintiff, subject to the opinion of the court upon this question: "Whether the plaintiff, under the circumstances of this case, can recover back from the defendant the money he paid on the said bills or either of them."

Lord MANSFIELD stopt him [defendant's counsel] from going on, saying that this was one of those cases that could never be made plainer by argument. It is an action upon the case for money had and received to the plaintiff's use. In which action, the plaintiff cannot recover the money, unless it be *against conscience* in the defendant to retain it; and great liberality is always allowed in this

sort of action. But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of any forgery.

Here was no fraud; no wrong. It was incumbent upon the plaintiff to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance, the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out "that they were forged;" and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had *actual encouragement* from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value *bona fide.* It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.

Rule: that the *postea* be delivered to the defendant.[1]

HOLMES, C. J., IN DEDHAM NATIONAL BANK v. EVERETT NATIONAL BANK.

177 MASS. 392.—1901.

THE plaintiff's argument is directed to proving that we should not adopt the rule laid down in Price v. Neal, 3 Burrows, 1354, according to which a drawee paying a forged draft or check to a *bona fide* purchaser cannot recover back the money paid. We are aware that this rule has been questioned by some text writers. But it is of such universal, or nearly universal, acceptance that we shall go into no extended discussion. Gloucester Bank v. Salem Bank, 17 Mass. 33, 42, 43; Bank v. Bangs, 106 Mass. 441, 444; Welch v. Good-

[1] For discussion see Ames "Doctrine of Price v. Neal," 4 Har. L. Rev. 296; Keener, Quasi-Contracts, pp. 154-157; Woodward, Quasi-Contracts, §§ 80-92. The doctrine is held to be enacted in § 62 (draughtman's number) of the Negotiable Instrument Law: Nat. Bank v. Bank, 141 Mo. App. 719 (1910); Cherokee Bank v. Trust Co., 33 Okla. 342 (1912); dictum in accord, Title Co. v. Haven, 196 N. Y. 487, 492 (1909), as to § 112 of the New York Negotiable Instruments Law; but for argument to the contrary see 70 Central L. Jour., pp. 417-418.

win, 123 Mass. 71, 77; First Nat. Bank of Danvers v. First Nat. Bank of Salem, 151 Mass. 280, 283, 24 N. E. 44; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 348, 6 L. Ed. 334; 2 Daniel, Neg. Inst. (3d Ed.) §§ 1359-1361.

Probably the rule was adopted from an impression of convenience rather than for any more academic reason; or perhaps we may say that Lord MANSFIELD took the case out of the doctrine as to payments under a mistake of fact, by the assumption that a holder who simply presents negotiable paper for payment makes no representation as to the signature, and that the drawee pays at his peril. See Wilkinson v. Johnson, 3 Barn. & C. 428, 436; Bernheimer v. Marshall, 2 Minn. 78, 84 (Gil. 61); Bank of St. Albans v. Farmers' & Mechanics' Bank, 10 Vt. 141, 145, 146; Ellis v. Trust Co., 4 Ohio St. 628, 662.

The ground of a recovery for a payment under a mistake of fact is that the existence of the fact supposed was the conventional basis or tacit condition of the transaction. If parties are so far at arm's length that each takes the risk of what he does, of course one of them cannot recover money paid because he finds that he has made a mistake. We believe that now, at least, especially in the case of a bank, it is a matter of general understanding that, when the holder of a check in no way contributes to the deception, the bank does take the risk of paying, so far as the signature is concerned. But, if this is so, mistake disappears as a ground for recovery, and there is no other. It is vain to point out that in other cases more or less analogous there is an implied representation, e. g., Railroad Co. v. Richardson, 135 Mass. 473. The grounds for difference in understanding may be very nice, but, even if the decisions had originated the difference without adequate ground, when once it exists its existence is a sufficient reason for continuing to decide in accordance with it. [1]

[1] In Bank of St. Albans v. Farmers' & Mech. Bank, 10 Vt. 141, 145 (1838), the court says: "The presentment of a bill to the drawee is a direct appeal to him to sanction or repudiate it. It is an inquiry as to its genuineness, addressed to the party, who, of all men, is supposed best able to answer it, and whose decision is most satisfactory. He is, moreover, the person, to whom the bill itself points, as the legitimate source of information to others, and if he were permitted to dishonor a bill, after having once honored it, the very foundation of confidence in commercial paper would be shaken. There is a wide difference between such a transaction and the passing of paper as a representative of money, between persons equally strangers to it, in the ordinary course of business. In the latter case, the receiver relies, in a measure, upon the paper, while in the former, the case is reversed, and the holder relies, and has a right to rely, upon the decision of him to whom the bill is addressed, and who alone is to determine whether it shall be honored or not."

Nor can money paid under mistake as to the genuineness of a bill of lading, attached to a draft, be recovered, Springs v. Hanover Bank, 209 N. Y. 224 (1913); and see note, 12 Mich. L. Rev. 397.

GERMANIA BANK v. BOUTELL ET AL.

60 MINN. 189.—1895.

ACTION by the Germania Bank of Minneapolis against William T. Boutell and Walter D. Boutell, doing business as Boutell Bros., and others. From an order sustaining demurrers to the complaint, plaintiff appeals. Affirmed.

MITCHELL, J.—This action was brought to recover money paid on a forged check. To the complaint the defendants separately demurred, on the ground that it did not state a cause of action. This appeal is from an order sustaining these demurrers. The complaint is very prolix, but the substance of its allegations is as follows: Osborne & Clark, lumber dealers in Minneapolis, were customers of the plaintiff bank, with which they kept a large deposit. They had in their employ a man named Seymour, at a salary of $7 per week, "a man of limited means and small personal resources," which facts were known to Boutell Bros. Boutell Bros. had sold Seymour some goods on credit on the installment plan, upon which there was due an installment of $10. During business hours of April 11th, Seymour went to Boutell Bros.' place of business in Minneapolis, with a check for $457.90, payable to his own order, purporting to be drawn by his employers, Osborne & Clark, on plaintiff bank; whereupon Seymour and Boutell Bros. both indorsed the check for the purpose of giving it credit and putting it in circulation, and to enable Seymour to pay the $10, and then went over to the defendant bank, and presented the check thus indorsed (Boutell Bros. identifying Seymour), and requested the bank to cash it, which it did, paying the money to Seymour and Boutell Bros. Although the places of business of both Osborne & Clark and of plaintiff were within a few blocks, and of ready access, Boutell Bros. made no inquiry to ascertain the genuineness of the check, and the defendant bank took no means to assure itself of the fact, except the identification of Seymour by Boutell Bros. and the indorsement of the check by the latter. The next day the defendant bank presented the check to the plaintiff, which, after examining the signature and believing it to be genuine, induced thereto by its apparent genuineness (it not being possible by ordinary care to detect the forgery), and by the financial standing and integrity of the defendant bank, which presented it, and of Boutell Bros., who indorsed it, "in the exercise of due care and caution," paid the check. It is also alleged that it was the custom and practice among all the banks in Minneapolis, well known to the defendants, for the bank upon which any check purports to be drawn to pay it when presented by any other bank (provided the drawer has sufficient funds), relying upon the genuineness of the check and of all prior indorsements; also not to pay a check "of any considerable size" purporting to be drawn by one of its depositors unless the party presenting it is identified, "save

when indorsements of responsible parties known to the drawee bank are indorsed thereon." On April 24th plaintiff discovered that the signature of Osborne & Clark was a forgery, and immediately notified the defendants of the fact, tendered back the check, and demanded payment of the amount, which was refused. The signature of Osborne & Clark had been forged by Seymour, who absconded April 12th, the same day on which plaintiff paid the check, but whether before or after is not alleged. His whereabouts is still unknown.

These facts present the question, upon which so much has of late years been said and written, whether the drawee of a bill of exchange, or the banker upon whom a check has been drawn, who has paid a bill or check upon which the drawer's signature has been forged, can, upon discovery of the forgery, recover back the amount from the holder, and if so, under what circumstances he may thus recover. It is a well-settled rule of law that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund. And the tendency of the modern authorities is to extend rather than to curtail the operation of this rule. One generally received exception to the rule is that where the drawee of a bill of exchange, or the banker upon whom a check has been drawn, pays a bill or check upon which the drawer's signature has been forged, he must stand the loss, and cannot recover back the amount, if the party to whom he paid it was a bona fide holder. This doctrine was established in England in 1762, in the leading case of Price v. Neal, 3 Burrows 1354; in which Lord MANSFIELD stopped defendant's counsel, saying the case was one that could not be made plainer by argument; that it was incumbent upon the plaintiff (the drawee) to be satisfied that the bill drawn upon him was in the drawer's hand before he accepted or paid it.

The same doctrine was firmly established in the commercial law of this country in Bank of U. S. v. Bank of Georgia, 10 Wheat. 333, in which Mr. Justice Story, referring to Price v. Neal, said: "After some research, we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted." And, so far as we have been able to discover, this general doctrine is recognized as the law by the courts of every state in the Union except Pennsylvania, where the rule has been changed by statute. The doctrine was announced and applied by this court as early as Bernheimer v. Marshall, 2 Minn. 78 (Gil. 61). That was a case of a forged draft, but the doctrine is equally applicable to a forged check. Indeed, if there is any difference in the cases, the reasons upon which the doctrine rests apply with more force to the latter than the former, for not only do checks pass from hand to hand as money more frequently and rapidly than do drafts or ordinary bills of exchange, but a banker is "even more bound" to know

a customer's handwriting than a drawee of a bill of exchange is bound to know the drawer's. Many modern text writers, some of them of learning and ability, have assailed the correctness of this doctrine, contending that the general rule as to money paid under mistake of fact should apply, and that the law ought to be that the bank, although at fault in not discovering the forgery of its customer's signature, can recover even from an innocent holder, if he will then be in no worse condition than if the bank had refused to pay the draft or check. See 2 Pars. Notes & B. 80; Morse, Banks, c. 33; Daniel Neg. Inst. c. 42; also, Am. Law Rev. April 1875, p. 411, and note to People's Bank v. Franklin Bank, 17 Am. St. Rep. 889 (88 Tenn. 299, 12 S. W. 716).

We shall not enter upon a consideration of the soundness of the argument against the doctrine, or as to which rule we would adopt if the question was *res integra,* because we do not feel at liberty to overrule or disregard a doctrine so well established and so firmly rooted in the commercial law of the country. If the rule is incorrect or works badly in practice, its change must be left to the legislature. We may say, however, that the opponents of the doctrine seem to have found no followers among the courts. We may also suggest that perhaps the courts themselves have given the opponents of the doctrine an unnecessary vantage ground, by frequently placing it exclusively on the narrow ground of actual negligence on the part of the drawee in not discovering the forgery, because he was bound to know the signature of his own customer or correspondent. It is undoubtedly true that he is in better position than a stranger to know his customer's signature, and that men have a right to deal with checks and drafts on that assumption; but it does not seem to us that the doctrine rests entirely on this narrow basis of actual negligence on the part of the drawee. The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind, to which the drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact. In view of the use of this class of paper as money, it was considered that public policy required that, as between the drawee and good-faith holders, the drawee bank should be deemed the place of final settlement where all prior mistakes and forgeries should be corrected and settled once for all, and, if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that that time and place should be the paying bank and the date of payment; and that, if not done then, the failure to do so must be deemed the constructive fault of the payee bank, which must take the consequences. See dissenting opinion of Mr. Justice Snodgrass in People's Bank v. Franklin Bank, 88 Tenn. 299, 12 S. W. 716.

The rule that, if a bank pays a check under the misconception

that it has funds of the drawer, it cannot recover from a *bona fide* holder, but must look to the drawer alone for redress, is founded on much the same reasons. There is not as much force as may at first seem in the suggestion of practical objections to the doctrine. In large commercial centers, where vast numbers of checks have to be rapidly exchanged between banks, it is always done through and under the clearing-house rules, adopted by the banks for mutual convenience, by which checks paid in that way may be returned within a certain time, if it be found that they are not genuine or that the drawer had no funds. And the doctrine has no application to cases where, as is common in cities, a customer of a bank deposits checks purporting to be drawn on other banks. Entirely different principles apply to such cases. But while the general doctrine is too well established to be overruled or disregarded, yet it is undoubtedly true that the trend of the modern authorities is to impose upon it some limitations and modifications; so that it is not always easy to definitely state when a case falls within the doctrine or comes within the general rule as to money paid by mistake. From what examination we have been able to make of the authorities, we have arrived at the conclusion that there are very few well-considered cases which go further than to hold that the bank may recover back money paid on a check to which the signature of one of its customers was forged, when there was a lack of good faith on the part of the payee towards the bank, as when he knew the check was forged, or knew of circumstances casting suspicion on its genuineness not known to the bank, and which he did not communicate to it, or where the holder was negligent in not making due inquiry as to the validity of the check before he took it, and the drawee, having a right to presume that he had made such inquiry, was itself thereby excused from making inquiry before paying it. In the first case the holder is really a party to the fraud, and is not a good-faith holder. In the second case, he has, by his negligence, contributed to the consummation of the mistake on part of the drawee by misleading him.

There is no allegation that either of the defendants knew or suspected that the check was forged. So far as appears, they both acted in entire good faith. All that is claimed against either is negligence. It remains only to consider whether either is charged in the complaint with any act of negligence in failing to make proper inquiry as to the genuineness of the check, and which the plaintiff assumed, and had a right to assume, that they had made, so as to excuse it for not making the investigation as to the genuineness of its own customer's signature which it otherwise would have made. So far as the defendant bank is concerned, there is only one side to the question. When it was requested to cash a check purporting to be drawn by one not its customer, on another bank, payable to a person unknown to it, it took the precautions, which any prudent bank would have taken, to have the payee identified and the check indorsed by a responsible party, and thereby protect itself against

loss in case the check was not honored when presented for payment. This is just what any bank would naturally do, and has a right to do, under such circumstances, instead of going in search of the maker of the check to ascertain from him if his signature is genuine, and then going to the drawee bank to ascertain if he has funds on deposit with which to meet it. It owed the plaintiff no duty to investigate as to the genuineness of the signature of its own customer, and the plaintiff had no right to assume that it had made such investigation. It seems to us that the same is true as to Boutell Bros. The distinction must be kept clearly in mind between their duty and responsibility to the defendant bank or any other *bona fide* indorsee of the check, and their duty and responsibility to the plaintiff bank, with reference to the genuineness of the signature of its own customer. By indorsing the check, Boutell Bros. undoubtedly guaranteed to the defendant bank the genuineness both of Osborne & Clark's signature and of Seymour's indorsement as the payee. That was the very purpose of their indorsement. And, if the indorsement of Seymour had proved to be forged, they would no doubt have been liable to plaintiff had it been thus led to pay the check to one not the owner of it; for by indorsing it they guaranteed to all persons, including plaintiff, the geunineness of the preceding indorsement. But upon the question of the genuineness of the signature of Osborne & Clark, the drawee's own customers, the case stands upon an entirely different footing. Not being the original payees of the check, the indorsement of Boutell Bros. constituted no guaranty or representation to the drawee that the signature of the drawer was genuine;[1] and the plaintiff had no right to rely on it as such, or to assume that Boutell Bros. had investigated as to its genuineness. That was a matter which it devolved on the plaintiff to ascertain for itself when the check was presented. In fact, the complaint negatives the idea that the plaintiff acted on any such assumption; for it is alleged that it did examine the signature with due care and caution, that it was to all appearances genuine, and that it was not possible by any ordinary care or precaution to detect the forgery.

Our conclusion is that as to both demurrers the order appealed from must be affirmed.

CANTY, J. (dissenting)—I cannot concur in the foregoing opinion. Because error is gray with age is no reason why it should be respected or followed. It seems to me that the foregoing opinion is a mere apology for such error, and this is true of the opinion in most of the modern cases on the question here involved. I concede that it is good public policy to hold that a banker should know the signature of his depositor. It tends to greater vigilance on the part of the banker, and more prompt discovery of the forgery, which makes the business of forgery more dangerous and less successful. But it does not follow that this is the only principle involved in this kind of a case, or that it should overturn and exclude all other well-

[1] There is some judicial sanction for an exception where defendant payee has indorsed the paper. See Williamsburgh Trust Co. v. Tum Suden, 120 N. Y. App. Div. 518 (1907); criticism, 56 Univ. of Pa. L. Rev. 122; Woodward, Quasi-Contracts, p. 128, note 2.

established principles applicable thereto. There is no stronger or better established principle of law or public policy than that which holds that no one shall be allowed to retain the consideration received by him on a forged instrument, however innocent he may be, unless he can invoke the aid of the doctrine of estoppel. Even when a person has been deceived by the forgery of his own signature, and has paid the forged obligation, he may recover back the money so paid, from an innocent holder. Welch v. Goodwin, 123 Mass. 71; 2 Morse, Banks, p. 768, § 464. This principle tends to cause greater vigilance on the part of every one about to take such paper, and to prevent him, when he has taken it, from suppressing his suspicions, and putting the paper off on some one else, instead of investigating the matter and pursuing the guilty parties. Why should the law in such a case offer a premium on attempting to put the paper off on the drawee bank? The money of a bank is not legitimate plunder, and a person receiving it through mistake and without consideration ought not to be entitled to retain it. The mere fact that a bank pays a forged check drawn upon it is no reason why it should lose its money. It was the absolute duty of the bank to know its depositor's signature, and detect the forgery, and it should suffer any loss caused by its failure to perform that duty; but there is no principle of law which says that, when such failure has caused no loss, the bank shall, as a mere penalty, forfeit the money so paid by it.

The transfer of negotiable paper by one holder to another is accompanied by an implied warranty that the paper is genuine. Brown v. Ames, 59 Minn. 476, 61 N. W. 448. But, when a bank pays a check drawn upon it, there is no such implied warranty that the signature of the maker is genuine. On the contrary, it is the duty of the bank to ascertain, when the check is presented, whether or not the signature to it is genuine. It owes this duty not only to the innocent holder presenting the check, but also to all prior innocent holders. If it fails in this duty, it can only recover back the money so paid by it on the ground that it was paid and received by mutual mistake and without consideration, and that none of the successive innocent holders through whose hands the check passed will suffer any loss by reason of such failure if compelled to return the consideration received by him; that is, that none of such innocent holders will be in a worse position when he has returned such consideration than he would be if the check had not been paid by the bank. There is no reason why this rule should lead to multiplicity of actions, or result in conditions too complex for practical solution. When the bank brings suit against the last holder to whom it paid the check, he can give notice of the suit to the next prior holder of whom he received it, and who is liable over to him on such implied warranty, and thereby bind such prior holder by the result of the suit. See Love v. Gibson, 2 Fla. 598; Kip v. Brigham, 6 Johns. 158, 7 Johns. 168; People v. Judges of Monroe, 1 Wend. 19; Blasdale v. Babcock, 1 Johns. 517; Bigelow, Estop. 84. I see no reason why the second last holder of the check cannot in like manner give notice of the suit to the third last holder of it, and thereby bind him by the result of that suit. And it seems to me that the defense will be entitled

to plead and prove the existence of as many successive innocent prior holders as it can, and thereupon the burden should, perhaps, be thrown on the plaintiff bank to prove that none of these holders will be in a worse position when he has, by reason of the recovery of the bank, been compelled to return the consideration received by him, than he would be if the bank had never paid the check.[1]

BANK OF COMMERCE v. THE UNION BANK.

3 Comst. (N. Y.) 230.—1850.

The Bank of Commerce brought assumpsit against the Union Bank, to recover money paid by mistake.

On the 18th day of December, 1847, the New Orleans Canal and Banking Company drew a draft on the Bank of Commerce in New York, payable to the order of "J. Durand," for one hundred and five dollars. After the draft was issued it was fraudulently altered in several respects, and among others, by the substitution of the word "thousand" for "hundred," and the name "Bonnet" instead of "Durand," so that it appeared to be a draft for one thousand and five (instead of one hundred and five) dollars, and payable to the order of J. Bonnet (instead of J. Durand). In this altered condition, and bearing the indorsement "J. Bonnet," the Union Bank in New York received the draft from the State Bank of Charleston for collection, and credited the amount to that bank. The Bank of Commerce on the draft being presented by the Union Bank, paid it to the latter. Two days afterwards the Bank of Commerce received advices from the New Orleans Canal and Banking Company, and then ascertained the alterations in the draft. Thereupon the draft was returned to the Union Bank, and the money, which had been paid, demanded; but payment was refused.

Ruggles, J.—The payment of a bill of exchange by the drawee is ordinarily an admission of the drawer's signature, which he is not afterwards, in a controversy between himself and the holder, at liberty to dispute; and therefore if the drawer's signature is on a subsequent day discovered to be a forgery, the drawee cannot compel the holder to whom he paid the bill, to restore the money, unless the holder be in some way implicated in the fraud. Price v. Neal, 3 Burr. 1354. This rule is founded on the supposed negligence of the drawee in failing by an examination of the signature, when the bill is presented, to detect the forgery and refuse payment. The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payer, from this imputed negligence, must bear the loss. In Price v. Neal, the plaintiff had paid to Neal, the holder, two bills of exchange, purporting to be drawn on him by Sutton,

[1] Contra to the prevailing doctrine are First Nat. Bank of Lisbon v. Bank of Wyndmere, 15 N. Dak. 299 (1906); Amer. Express Co. v. State Bank, 27 Okla. 824 (1911); and statutory rule since 1849 in Pennsylvania, 3 Purdon's Dig. 3262 (13th ed.).

whose name was forged. On discovery of the forgery, Price brought his action against Neal, to recover back the money as paid by mistake. Lord MANSFIELD, in delivering the opinion of the court in favor of the defendant, said: "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it, but it was not incumbent upon the defendant to inquire into it." "Whatever neglect there was, was on his side. It is a misfortune which has happened without the defendant's fault or neglect."

In Wilkinson v. Lutwidge, 1 Stra. 648, Lord Chief Justice PRATT was of opinion that "acceptance was a sufficient acknowledgement of the drawer's handwriting on the part of the acceptor, who must be supposed to know the hand of his own correspondent." So the acceptance of a bill, whether general, or for honor, or *supra* protest, *after sight of the bill,* admits the genuineness of the signature of the drawer; and consequently if the signature of the drawer turns out to be a forgery, the acceptance will nevertheless be binding, and entitle a *bona fide* holder for value and without notice to recover thereon according to its tenor, Story on Bills, § 262.

But it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill. There is no ground for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. In the present case, that part of the bill is in the handwriting of one of the clerks in the office of the Canal and Banking Company in New Orleans. The signature was in the name and handwriting of the cashier. The signature is genuine. The forgery was committed by altering the date, number, amount and payee's name. No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill, is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous but unjust. The drawee would undoubtedly be answerable for negligence in paying an altered bill, if the alteration were manifest on its face. Whether it was so or not in this case was properly submitted to the jury, who found that it was paid by mistake and without knowledge of, or reason to suspect the fraudulent alterations. It would have been difficult to find otherwise upon the evidence, the bill having passed through the defendant's bank, and the Charleston bank without suspicion. If the forgery had been in the name of the drawer, it might not perhaps have been incumbent on those banks to scrutinize the bill, because they might have relied on the drawee's better knowledge of the hand; but the

forgery being in the body of the bill the plaintiffs were not more in fault than the defendants.

The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill each indorsee receives it on the credit of the previous indorsers; and it was the interest and duty, in the present case, of the Bank of Charleston, to satisfy itself that the bill was genuine, or that its immediate indorser was able to respond in case the bill should prove to be spurious. The party who fraudulently passed the bill cannot avoid his liability to refund on the pretense of delay in detecting the forgery, or in giving notice of it; and if reasonable diligence is exercised in giving notice after the forgery comes to light, it is all that any of the parties can require. Canal Bank v. The Bank of Albany, 1 Hill 287, 292-3.

In Smith v. Mercer, 6 Taunt. 76, in Cocks v. Masterman, 9 B. & C. 902, and in Price v. Neal, 3 Burr. 1354, the plaintiffs who paid the forged bills, being chargeable with a knowledge of the signature of the drawer (which was forged), were held to have paid it negligently and without due caution and examination, and on that ground it was that the defendants to whom they paid the money were held not liable without immediate notice of the forgery. But in the present case no such negligence is imputable to the plaintiffs, the plaintiffs being no more capable of detecting the forged alteration by inspection of the bill than either of the other parties.

This action is not founded on the bill as an instrument containing the contract on which the suit is brought. The acceptor can never have recourse on the bill against the indorsers. But the plaintiffs' right of recovery rests on equitable grounds. In The Canal Bank v. The Bank of Albany, the principle was recognized that money paid by one party to another through mutual mistake of facts in respect to which both were equally bound to inquire, may be recovered back. The defendants here, as in that case, have obtained the money of the plaintiffs without right and on the exhibition of a forged title as genuine, the forgery being unknown to both parties. The defendants ought not in conscience to retain the money, because it does not belong to them; and for the further reason that the defendants and the previous indorsers have, each, on the same principle, their remedy over against the party to whom they respectively paid the money, until the wrong-doer is finally made to pay. If that party should be irresponsible, or if he cannot be found, the loss ought to fall on the party who, without due caution, took the bill from him.

In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within the ordinary time to charge the previous parties to the bill is excused, provided notice of the forgery be given as soon as it is discovered.

Judgment affirmed.[1]

[1] In Wilson, administrator, v. Alexander, 4 Ill. 392 (1842), "on the trial before a jury, it was proved that the plaintiff held a note on the defendant,

COOKE ET AL. v. UNITED STATES.

91 U. S. 389.—1875.

CHIEF JUSTICE WAITE.—The United States sued Jay Cooke & Co., in this action, to recover back money paid them by the assistant treasurer in New York for the purchase or redemption before maturity, under the Act of August 12, 1866 (14 Stat. 31), of what purported to be eighteen 7-30 treasury notes, issued under the authority of the act of March 3, 1865 (13 Stat. 468), but which it is alleged were counterfeit. Cooke & Co. insist that if they honestly believed the notes in question were genuine, and, so believing, in good faith passed them to the assistant treasurer, and he, under a like belief, and with like good faith, received and paid for them, there can be no recovery, even though they may have been counterfeit. As this defense meets us at the threshold of the case, it is proper that it should be first considered.

It was conceded in the argument that when the United States become parties to commercial paper they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court. The Floyd Acceptances, 7 Wall. 557; United States v. Bk. of Metropolis, 15 Pet. 377. As was well said in the last case, "From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be in maintaining these principles." It was also conceded that genuine treasury notes, like those now in question, were, before their maturity, part of the negotiable commercial paper of the country. We so held at the last term, in Vermilye & Co. v. Express Co., 21 Wall. 138.

It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and

made to the plaintiff's intestate; that the defendant paid the plaintiff the amount of the note, and took it up, passing to him in part payment, a note for $150, purporting to be executed by the intestate payable to Isaac Krieder, by him assigned to Joseph Allen, and by Allen assigned to the defendant. It was further shown, that the note was a forgery; but it was admitted by the parties, that the defendant, at the time of the transfer, had no knowledge that it was forged." On appeal the court said: "A person who appears to be a contracting party to forged negotiable paper, is charged with a knowledge of its genuineness, and acts at his peril, when called upon by an innocent holder, for performance of the contract. If he accepts, or promises to pay, he is not permitted to repudiate his act because of the forgery, but is bound to perform it. If he pays, he cannot recover back the money; he takes upon himself the risk of the genuineness of the instrument. As between other persons, who are not connected with the paper as parties, and stand in equal relations, each having the same means of ascertaining its genuineness, the rule is essentially different; the question of authenticity is at the risk of the person passing the paper. * * * We are of the opinion it would be carrying the rule to an unreasonable extent, to charge the administrator with knowledge of the genuineness of an instrument, to which the name of his intestate purports to be affixed, as maker." ("A. Lincoln, for the plaintiff in error.")

pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule; because, as every man is presumed to know his own signature, and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he *ought* to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in Gloucester Bank v. Salem Bank, 17 Mass. 45: "The party receiving such notes must examine them as soon as he has opportunity, and return them immediately: if he does not, he is negligent; and negligence will defeat his action."

When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character,—as, for example, an examination of accounts or records kept by him for the purposes of verification,—negligence sufficient to charge him with the loss cannot be claimed until this examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of acceptance and adoption. But if the presentation is made at a time when, or at a place where, such an examination cannot be had, time must be allowed for that purpose; and, if the money is then paid, the parties, the one in paying and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further inquiry may be made, and, if the paper is found to be counterfeit, it may be returned within a reasonable time. What is reasonable must in every case depend upon circumstances; but, until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay. So, too, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument. It is the negligence of the principal that binds; and that of the agent has no effect, except to the extent that it is chargeable to the principal.

Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. United States v. Kilpatrick, 9 Wheat. 735; Gibbons v. United States, 8 Wall. 269. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of

a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and, if it fails in this, its claim upon the parties is lost. United States v. Barker, 12 Wheat. 559. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world. * * *

Mr. Justice CLIFFORD (with whom concurred Mr. Justice FIELD and Mr. Justice BRADLEY), dissenting—I dissent from the opinion of the court in this case,—

1. Because I am of the opinion that the United States are not liable for forged paper under any circumstances.

2. Because I am of the opinion that the United States are not liable for its paper-promises fraudulently or surreptitiously put into circulation, not even if the fraudulent act was perpetrated by treasury officials.[1]

RIVERSIDE BANK v. FIRST NAT. BANK OF SHENANDOAH.

74 FED. 276; 38 U. S. APP. 674—1896.

IN error to the circuit court of the United States for the southern district of New York.

Error is assigned of the ruling of the trial judge in directing the jury to find a verdict for the defendant. The defendant was

[1]In Welch v. Goodwin, 123 Mass. 71, 77 (1877), the court says: "The question which we are called upon to decide is, whether, under any circumstances, a party may recover back money paid upon a security bearing a forged signature of himself, supposing it, at the time of payment, to be his own genuine signature. We can have no doubt that he may. This is entirely clear in case he was induced to make the payment by fraud or misrepresentation. Nor is it necessary that fraud or misrepresentation should exist. An innocent mistake, whether arising from natural or temporary infirmity or otherwise, made without fault upon his part, entitles him to the same relief. How far this right would be affected by neglect upon his part to give prompt notice of the mistake, or by any change affecting the situation or rights of the person to whom the payment is made, we are not called upon to consider. Here notice was given immediately upon discovering the forgery."

the owner, through a purchase for value, and in due course of business, of a promissory note dated May 2, 1887, made by Liebler & Co. to the order of and indorsed by Yuengling, and payable four months after date at the banking house of the plaintiff. The note was made merely for the accommodation of Yuengling. Shortly before maturity the defendant forwarded the note for collection to its correspondent at New York City, the National Park Bank, and that bank, through its uptown collecting agent, on September 3, 1887, presented the note to the plaintiff, with a request for certification. Liebler & Co. were customers of the plaintiff, and the plaintiff, supposing the account of the firm to be good for the amount of the note, made the certification. Shortly afterwards the plaintiff discovered that in fact the account of Liebler & Co. was not good for the amount of the note. Thereupon plaintiff endeavored to ascertain what bank was the owner of the note or had caused it to be presented for certification, but was unable to do so until late in the afternoon of September 5th. On the morning of September 6th plaintiff notified the National Park Bank that the note had been certified by mistake, and that at the time plaintiff was not in funds of Liebler & Co. sufficient to pay it, and requested that bank to withhold the note from its exchanges for the clearing house; but that bank refused to withhold the note. The First National Bank was the clearing-house bank for the plaintiff, and by the rules of the clearing house was obligated to pay all items against banks for which it cleared in the exchanges. When the note was sent, with the other exchanges of the National Park Bank, to the clearing house, the First National Bank paid it conformably with the rules. The rules of the clearing house provide that: "Errors of the exchanges, and claims arising from return of checks or from any other cause, are to be adjusted directly between the banks who are parties to them, and not through the clearing house; the association being in no way responsible in respect to them. All checks, drafts, notes, or other items in the exchanges returned as not good or missent shall be returned the same day directly to the bank from whom they were received, and the said bank shall immediately refund to the bank returning the same the amount which it has received through the clearing house for said check, draft, notes, or other items so returned to it, in specie or legal tender notes." The First National Bank did not return the note to the National Park Bank, but on September 6th the plaintiff caused it to be formally presented for payment and protested for nonpayment, giving notice thereof to Yuengling. The plaintiff produced the note, and offered to surrender it to the defendant.

WALLACE, Circuit Judge (after stating the facts as above).—We are unable to discover any ground upon which the plaintiff was entitled to recover. The certification of the note by the plaintiff was an agreement to pay the amount, and the contract can no more be rescinded than could any other contract because one of the parties

in making it was under a misapprehension of fact. A note made payable at a bank where the maker keeps an account is equivalent to a check drawn by him upon the bank; and the bank, if in funds, owes him a duty to pay it on presentation. Aetna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 88; Indig v. Bank, 80 N. Y. 100. The certification of a check drawn upon a bank is equivalent to the acceptance of a bill of exchange, and imposes upon the bank an obligation to pay the amount for which the check is drawn to the holder, upon demand, at any time before the statute of limitations attaches. Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125. In Merchants' Bank v. State Bank, 10 Wall. 604, the court used this language:

"By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good; and this agreement is binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume."

In Meads v. Bank, 25 N. Y. 143, it was held that the certification as good of a promissory note payable at bank, where the course of business between banks is, instead of actually paying notes of customers, when in funds, on presentment, to mark them as good, and settle in the exchanges, is an absolute promise to pay; not the agreement to pay the debt of another, but the engagement of the bank to pay its own debt to the holder of the note. The certification entitles the holder to suspend any remedy against the maker, and relax steps to charge the indorser of the paper. The bank has authority from the note itself to apply to its payment the funds of the maker (Kymer v. Laurie, 18 Law J. Q. B. 218), and when the holder accepts the certification the customer becomes a debtor to the bank. Thus the contract implied by the certification has both the elements of a good consideration, a resulting disadvantage to the promisee, and an accruing advantage to the promisor. Money paid under a mistake of fact is recoverable of the party receiving it, because good conscience forbids him to retain that which justly belongs to the other party; but the principle has no application to the case where the recipient has a right to retain the money because it has been paid pursuant to a contract which he was entitled to enforce. Assuming that the certification of the note, and its payment through the clearing house, was equivalent to a payment by the plaintiff over its counter to the defendant, the case falls within one of those exceptions to the general right to recover back money paid by mistake which are found in the law of negotiable paper. One of these exceptions is that the drawee of a bill of exchange is presumed to know the signature of the drawer, and payment by the drawee of the bill is ordinarily an admission of the genuineness of

the signature, which he is not afterwards, in a controversy between himself and the holder, at liberty to dispute. Another exception, recognized by the decided weight of authority, is that the payment of a check or of a note by the bank at which it is made payable, although made under misapprehension of the state of the maker's account with the bank, concludes the bank as against the holder of the paper. Bolton v. Richard, 6 Term R. 139; Aiken v. Short, 1 Hurl. & N. 210; Levy v. Bank, 4 Dall. 236; Peterson v. Bank, 52 Pa. St. 206; Oddie v. Bank, 45 N. Y. 735; Bank v. Swift, 70 Md. 515, 17 Atl. 336; Bank v. Burkham, 32 Mich. 328. The cases of Bank v. Wetherald, 36 N. Y. 335, and National Park Bank v. Steele & Johnson Manuf'g Co., 58 Hun, 81, 11 N. Y. Supp. 538, are cited as authorities to the contrary. 'In Bank v. Wetherald the question was not whether the money could be recovered back from the party to whom it had been paid, but whether a payment made to that party, the holder of the note, after the bank had discovered its mistake, and made to enable the bank to resume the control of the paper, and take steps to charge the indorsers, was an extinguishment of the note. That adjudication is, therefore, not in point. The case of National Park Bank v. Steele & Johnson Manuf'g Co. is in point, and is entitled to respectful consideration, although not a judgment of the court of last resort; but we are unable to accede to its conclusions. [1]

Upon principle, where the holder of a note presents it at the bank at which it is made payable, receives the money, and surrenders the paper, the transaction is, in effect, a purchase from the holder. It is a completed transaction, which cannot be rescinded except for fraud, or in case of mutual mistake. Where forged paper is delivered, the consideration fails and a different rule obtains. A case strictly analogous is where a bank accepts the check of a customer, and credits the amount to the account of the depositor. Of such a case the supreme court used this language:

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit, and received as a deposit, there being no fraud, and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an ex-

[1] In addition to the New York cases quoted in this paragraph, see Whiting et al. v. City Bank, 77 N. Y. 363 (1879). In this case the court says: "If the payment was not made by the bank by mistake, but was made voluntarily on the credit of the maker of the note, it is very clear that it could not be retracted. The payment of the note under such circumstances discharged the obligation of the indorser, and that obligation could not be revived by the bank, nor by any transaction between it and the plaintiffs. * * * * There is no legal presumption that payments made by a bank are made by mistake, even when the account of the party for whom they are made is not good. The fact, if material, must be proved."

ecuted contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned." Bank v. Burkhardt, 100 U. S. 686.

To permit a bank which has paid a note or check of a customer to rescind the transaction because it discovers that it was mistaken in the state of the customer's account, would, as is pointed out by Judge Cooley in Bank v. Burkham, *supra,* reverse the rule of commercial law, and transfer from the acceptor to the payee the responsibility which the former assumes by the acceptance and the loss, which should be left where it fell. He said:

"We think it would be an exceedingly unsafe doctrine in commercial law that one who has discounted a bill in good faith, and received notice of payment, the strongest possible assurance that it was drawn with proper authority should afterwards hold the moneys subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper consists in their perfect certainty and reliability. They would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motives which influenced the latter to honor the paper."

The facts of this case illustrate the truth of these observations. The defendant, relying upon a certification by the plaintiff, took no steps to charge the indorser upon the note; and, if this action could be maintained, in order to regain the situation in which it was placed by the act of the plaintiff, would be obliged to resort to the uncertain chances of a litigation with the indorser. Treating the case as one in which the money was paid by the plaintiff over its counter to the defendant, the language of the court in Aiken v. Short is apposite:

"The plaintiffs, having voluntarily parted with their money to purchase that which the defendant had to sell, though no doubt it turned out different to and of less value than what they expected, cannot maintain the action." * * *

The trial judge properly directed a verdict for the defendant, and the judgment should be affirmed. [1]

[1] Accord, Chambers v. Miller, 13 C. B. N. S. 124 (1862). But in Massachusetts recovery is allowed, unless there has been an alteration of defendant's position. Merchants' Bank v. Bank of the Commonwealth, 139 Mass. 513 (1885).

8. MISTAKE AS TO AGENT'S AUTHORITY.

HAWTAYNE v. BOURNE.

7 M. & W. (EXCH.) 595.—1841.

DEBT for money lent, and on an account stated. Plea *nunquam indebitatus.*

The defendant, who resides at Liverpool, was the holder of 100 shares in a company established for the working of a mine called the Trewolvas Mine, in the parish of St. Columb Major, Cornwall. The mine was managed by an agent, appointed by the directors of the company for that purpose. In March, 1839, in consequence of the shareholders not having paid up the calls regularly, the concern fell into difficulties, and the agent, from want of funds, became unable to pay the laborers; a considerable number of whom, their wages being in arrear applied to the magistrates, and obtained warrants of distress upon the materials belonging to the mine. The agent, finding that these warrants were about to be put into execution, applied in the name of the company, but in fact upon his own responsibility, and without the knowledge of the shareholders, to the St. Columb branch of the Western District Banking Company for a loan of £400 for three months, which was advanced accordingly and placed by the bank to the credit of the company, and out of it the arrears of wages were discharged. To recover the balance of that sum the present action was brought. There was some evidence of a conversation between the defendant and the agent, in which the former had asked whether they could not get money from the bank to keep the concern going; but this evidence was not left to the jury. The learned judge, in summing up, stated to the jury, that although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal so as to bind him, yet, if it became absolutely necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity; and he left it to the jury to say whether the pressure on the concern was such as to render the advance of this money a case of such necessity. The jury found for the plaintiff.

PARKE, B.—This is an action brought by the plaintiffs, who are bankers, to recover from the defendant, as one of the proprietors of the Trewolvas Mine, a mine carried on in the ordinary way, the balance of a sum of £400, advanced by them to the agent appointed by the company of proprietors for the management of the mine. Now the extent of the authority conferred upon the agent by his appointment was this only—that he should conduct and carry on the affairs of the mine in the usual manner; there is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking; and

certainly no such authority could be assumed. There are two grounds on which it is said the defendant may be made responsible; first, on that of a special authority given to the agent to borrow money; and secondly, on the assumed principle, that every owner who appoints an agent for the management of his property must be taken to have given him authority to borrow money in cases of absolute necessity. There certainly was, in the present case, some evidence from which a jury might have inferred that a power to borrow money, for the purposes of the mine, had been expressly given to the agent; but that evidence does not appear to have been left to the jury, and therefore the verdict cannot be supported on the first ground. Then as to the second ground, it appears that the learned judge told the jury that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honor of the drawer. The latter derives its existence from the law of merchants; and in the former case the law, which generaliy provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and, by an instrument of hypothecation, to pledge the ship itself if necessary. If that case be analogous to this, it follows that the agent had power not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion, that the agent of this mine had not the authority contended for. Whether he had or had not was a question for the jury; but, on the general principles of law, it seems to me that the ruling of the learned judge cannot be supported, and therefore that the rule for a new trial must be made absolute. [ALDERSON, B., concurs in an opinion; ROLFE, B., concurs.][1]

KELLEY v. LINDSEY.

7 GRAY (MASS.) 287.—1856.

ACTION of contract on a check payable to the plaintiff and signed "Benjamin Lindsey, by George G. Coffin." There were also counts for money lent and money had and received. The evidence tended to

[1] But see Reid v. Rigby & Co., post, p. 403.

show that Coffin was at the time the check was drawn, the financial agent and confidential clerk of defendant.

DEWEY, J.—* * * If Coffin had no authority to borrow money on account of the defendant, to expend in his business and to pay his debts, the money advanced for that purpose, though so applied, created no debt against the defendant. No one can thus make himself a creditor of another by the unsolicited payment of his debts; and it is not enough to create a liability, that the defendant had the benefit of the money, by reason of its being expended in his business or in the payment of his debts. There must have been shown some authority to make such advance or payment of money, proceeding from the defendant, in addition to the mere fact of its being applied for his benefit, in order to charge him with the same in a suit at law. For this reason, the court are of opinion that the verdict must be set aside and a New trial had.[1]

SPOONER v. THOMPSON AND WIFE.

48 VT. 259.—1876.

REDFIELD, J.—The plaintiff claims to recover for money loaned to the defendant, Lois Thompson, while sole and unmarried.

It is not denied that J. P. Cutting was the agent of said Lois, in buying and selling goods at her store in Richford, and that said Cutting, acting as such agent, borrowed money of the plaintiff. The plaintiff claims in argument that the written articles of agreement authorize Cutting to borrow on the credit of said Lois. The written stipulations provide that "she will furnish capital, or authorize him (Cutting) to employ or obtain credit on her name and responsibility, for the purchase of goods to supply said store and business as aforesaid, to an amount not exceeding $4,000." That "the entire purchases, including purchases for cash down, and credit, shall not exceed four thousand dollars." "That while acting within the limits herein before mentioned, as agent, and to the extent of capital employed in the purchases aforesaid, and the legal and proper transaction of said business, and to no other or further extent, the acts of her agent shall be binding on her." The agency of Cutting was express and limited, and, we think, conferred no authority to *borrow money* on her credit.

II. It was claimed that a portion of the money loaned by the plaintiff was paid by Cutting to Holmes & Ross, for purchases, made of said firm to supply said store, and that defendants thus had the benefit of it. This was denied by the defendants. It seems that Cutting settled the account with Holmes & Ross, and that said Lois gave her note for the balance found due, and afterwards paid it. The plaintiff requested the court to charge the jury, "that if Mrs. Post (now Lois Thompson) settled the claim of Holmes & Ross,

[1] That there might be subrogation in equity, see Newell v. Hadley, 206 Mass. 335, 342-343 (1910); Keener, Quasi-Contracts 331.

on which the $100 borrowed of the plaintiff was credited, to that extent, at least, she is bound." The court refused so to charge, and did charge, that if the money went into her business, and she had the benefit of it, "she would be holden to pay it, provided the jury find that she afterwards promised to pay it." The defendant's evidence tended to show that Mrs. Post had no knowledge that any money borrowed of the plaintiff went to pay Holmes & Ross; or that any such money appeared on the books of said store; and denied that any such money went for her benefit, or into the business of said store. If Cutting borrowed money of the plaintiff on the credit of Mrs. Post, without her authority, and paid a part of it to Holmes & Ross without her *knowledge,* it could give the plaintiff no right of action against her. She could not be made the debtor of the plaintiff without her *consent.* If Cutting borrowed money in her name, without authority, and she, having knowledge of the fact, and that the money went into her business, and she had the benefit of it, she thereby adopts the transaction, and makes it her own. The request to charge the jury, by the plaintiff, was, therefore, properly refused, and the charge of the court, so far as it is stated, is sound law. * * * * Judgment affirmed.[1]

[1]Accord, Baldwin v. Burrows, 47 N. Y. 199 (1872), (but see Evans v. Garlock, 37 Hun 588 (N. Y. Supreme Ct. 1885)); Bohart v. Oberne, 36 Kans. 284 (1887). In Wall v. Chelsea Club, 88 S. C. 61 (1911), recovery was allowed by an erroneous application of estoppel against the principal. See 9 Mich. L. Rev. 736, note.

In Fay v. Slaughter et al., 194 Ill. 157 (1902), plaintiff in error, Fay, gave to his clerk a power of attorney "to be my true and lawful attorney, for me and in my name to draw checks, bills of exchange, and drafts, and make orders and overdrafts upon the Northern Trust Company of Chicago, and in my name to indorse checks, drafts, bills of exchange, notes, and orders for deposit in said Northern Trust Company, hereby confirming all that my said attorney shall do under above authority." The clerk abstracted stock certificates belonging to Fay and, forging Fay's name to the assignment, transferred them to innocent purchasers, Slaughter & Co., the defendants in error. In payment, the latter sent to the clerk, checks payable to the order of Fay. The clerk endorsed them with Fay's name, deposited them with the Northern Trust Company and they were credited to Fay. The clerk, in Fay's name, afterwards drew checks upon the trust company and appropriated the proceeds. After the facts were discovered, Slaughter & Co. made restitution of the stock to Fay and then sued Fay in this action for money had and received. The court said (p. 170): "We are unable to concur in the view that the mere passing of this money through the bank account of plaintiff in error without authority given by him, and in the absence of evidence showing it went to his benefit or was used by or for him, can be held to be such receiving of the money of defendants in error by him as in equity and good conscience renders him liable for money had and received for the use of defendants in error. In this record there is no evidence showing, or tending to show, that plaintiff in error got the real benefit of any of this money, either by checking it out for his own use or by its being checked and applied to his business."

FIRST BAPTIST CHURCH OF ERIE *v.* CAUGHEY ET AL., ADMINISTRATORS.

85 PA. ST. 271.—1878.

ASSUMPSIT by S. S. Caughey and H. B. Fleming, administrators of Joseph Neeley, deceased, to recover the amount unpaid, with interest, on the following note:

$900. ERIE, December 24, 1867.
On the 1st day of February, 1869, we promise to pay, to the order of Joseph Neeley, nine hundred dollars; it being for use of First Baptist Church. Value received.
W. J. F. LIDDELL,
HORACE L. WHITE,
JAMES D. ROSS,
SAMUEL Z. SMITH,
Trustees of the First Baptist Church, Erie, Pa.

The defendants resisted the claim on the ground, first, that under the charter of the church the trustees had no authority to execute such an obligation as the one in suit, nor to borrow money; and secondly, that the money was for the payment of a note previously given by W. J. F. Liddell, one of the trustees, to one Catharine Smith, for money borrowed from her by him individually, and with which he paid a subscription he had made towards the building-fund of the church.

On part of the plaintiff it was contended that, whether the trustees had the right to bind the church by such an obligation, or not, yet, if the money obtained from Mr. Neeley by the trustees was actually used in the construction of the church edifice, the church receiving the benefit of the same, there would be an implied obligation to pay, and plaintiff should be entitled to recover under the general *indebitatus assumpsit* counts in their declaration.

Verdict and judgment for the plaintiff.

Mr. Justice MERCER [*after deciding that the corporation had power to contract a debt for building, beyond the amount subscribed.*]—During the progress of the work, Mr. Liddell, one of the trustees, appears to have been the financial agent and manager, in behalf of the board of trustees. In raising the funds necessary, he borrowed $1200 from Mrs. Smith, and gave his individual note therefor. Subsequently the trustees borrowed $900 of Joseph Neeley, to pay so much of the debt due to Mrs. Smith, and four of them executed and delivered the note for the sum thus borrowed. The court doubted the power of the plaintiff in error to give the note, and the consequent liability of the corporation thereon alone; but substantially charged that there were certain implied powers incident to every corporation, and if they were satisfied, from the

evidence, that the money for which the note was given was actually used in rebuilding the church, and thus went to the benefit of the society, the law raised an implied obligation on the part of the church to repay it. It was contended on the argument that there was no evidence that the money was used in rebuilding the church. The answer to this objection is shown in several parts of the record. The note itself contains the written declaration of four of the trustees jointly, when engaged in making the loan, that the $900 were "for use of First Baptist Church." The settlement which Liddell subsequently made, as appears by the receipt signed by the president of the board of trustees, and one other trustee, declares, "We hereby assume all liabilities of said church for which said W. J. F. Liddell as trustee has become responsible, including note given to Mrs. Catharine Smith, signed by himself individually, for the use of said church, according to settlement made this day." On the trial of the cause, James Dunlap, president of the board of trustees, was called, by defendants in error, as a witness, and in his testimony in chief said, "in repairing church had to borrow money; were advised by counsel that church could not borrow it; must be individual; the money borrowed from Neeley was paid to Mrs. Catharine Smith, to discharge a debt to her for money borrowed by Mr. Liddell for the church." It is true, on cross-examination, his evidence goes to impair the validity of the receipt to which his name was subscribed, and he further said "none of the Neeley money was received by the church." I think the fair interpretation of his testimony is that the money was not actually paid into the hands of the trustees, but was paid directly by Neeley to Mrs. Smith. It was, however, a question for the jury to determine. It is further shown by the evidence that the plaintiff in error made a payment of $300 on the note given to Neeley; the indorsement thereof being in the handwriting of the treasurer, now deceased, of the corporation.

This chain of evidence, both written and verbal, tending to show how the business was conducted and settled, ratified by a partial payment, was certainly sufficient to submit to the jury to find that the money was used in rebuilding the church.

Judgment affirmed.

BILLINGS v. INHABITANTS OF MONMOUTH.

72 Me. 174—1881.

On exceptions and motion for a new trial. Assumpsit on three promissory notes signed "William G. Brown, Treasurer;" also for money had and received. Plea was general issue, and statute of limitations was set up under a brief statement. The verdict was for $3,004.81. The exceptions relate to the admission in evidence of the notes declared upon, of certain other notes, and of the records,

accounts, and settlements with the treausrer of the defendant town. Exceptions were also taken to the part of the charge to the jury given below:

"Now a question is raised here in the very beginning whether these notes are the notes of the town, or the notes of the treasurer. I do not deem it necessary to state in regard to that now. I do not care to state it for the reason that there are several actions pending, in which that very question will be raised and will be finally settled by the law court. And it is sufficient for me to say to you, that those notes were not authorized by any vote of the town. . . That lays the notes out of the case;"—and to other parts of the charge covering several pages.

BARROWS, J.— * * * * The notes were "laid out of the case," and the plaintiff's right to recover was made to depend upon his establishing what was necessary to entitle him to a verdict upon the count for money had and received. The testimony tending to show authority or ratification was weighed and found wanting. After this, there was no occasion to pass upon the construction of the notes, any more than there was in Parsons v. Monmouth, 70 Me. 264. That any negotiable paper, made by the officers of a town in the transaction of its ordinary business, not proceeding under special authority conferred by some statute, will be subject, even in the hands of a *bona fide* indorsee, to all equitable defenses that might be made against the original promisee, is well settled in this State, as appears in the case last named, and the cases there cited. And the plain doctrine of Bessey v. Unity, 65 Me. 342, and Parsons v. Monmouth, is that the holder of such paper who has lent money upon the representation of town officers that it was wanted for municipal use, must go farther and show the appropriation of the money lent to discharge legitimate expenses of the town, unless he can show that such officers were specially authorized, by vote of the town at a legal meeting, to effect the loan. The case at bar seems to have been tried in careful conformity with these rules. The fallacy of the greater part of the defendant's argument upon the exceptions consists in ignoring the fact that "the notes were laid out of the case."

It is strongly implied in the two cases last above cited that money thus advanced and shown to have been actually appropriated to the discharge of legal liabilities of the town, would be held recoverable in an action for money had and received against the town. We see no good reason to excuse the town from refunding it when it has been actually thus appropriated. The plaintiff by such proof brings his case fully within the principles that govern the action for money had and received. He shows his money received and appropriated by the agents of the town to the legitimate use of the town, and in such case the want of an express promise to repay it will not defeat the action. The law will imply a promise, sometimes, even against the denial and protestation of the defendant. Howe v. Clancey, 53 Me. 130. It is the payment of the lawful debts of the town by its own agents with the plaintiff's money which constitutes the

cause of action. To allow a recovery by the plaintiff of whatever sum he can show has thus inured to the benefit of the town, is a more compendious mode of settling the controversy than the English method of subrogating the lender of the money to the rights of the perhaps numerous corporation creditors, who have been paid with the funds procured without authority, a mode of doing justice which manifestly tends to a multiplicity of suits, when, for aught we see, the proper result may be reached, at all events with the assistance of an auditor, in a single action. * * *

The vital question of fact whether the plaintiff's money had actually been applied by the town officers to the extinguishment of legal claims against the town was settled by the jury against the defendants. The jury found that it was so applied. The testimony produced by the plaintiff, if believed, justified the finding, and there is nothing in its character or in that of the accounts produced which decisively stamps it as untrue. There is an apparent error of a few dollars in the reckoning of interest. When the plaintiff has cured this by a remittitur, the entry will be

Motion and exceptions overruled.[1]

WHITE RIVER SCHOOL TOWNSHIP v. DORRELL.

26 Ind. App. 538.—1901.

Action by William Dorrell, Sr., against the White River school township. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed on condition of the remission of a part of the judgment; otherwise, reversed.

[1] But in Baldwin v. Inhabitants of Prentiss, 105 Maine 469 (1909), the court says: "It is well settled by a long line of cases in this state, the last of which was Pierce v. Greenfield, 96 Maine 350, that an action will not lie against a town for money loaned to it, through its officers, without antecedent authority, unless their action has been ratified by the town, even if the money has been applied to the discharge of legitimate obligations of the town. See Lovejoy v. Foxcraft, 91 Maine 367, where the proposition was elaborately discussed. * * * It is the policy of the law in this state that a town may always invoke the doctrine of ultra vires, as a defense to a contract, express or implied, made for it by its officers, which it has neither authorized nor ratified. The general principles of equity and good conscience which are applied to individuals and business corporations can not alone be the basis of an action against a town. Lovejoy v. Foxcraft, supra. We can not say that a town must pay, simply because in good conscience, or even in common honesty, it ought to pay." See note, 23 Har. L. Rev. 569, where it is said that "in New England towns, since the private property of the citizens can be taken upon a judgment against the town, the powers and proceedings of the town are construed with the greatest strictness."

See, also, the cases on *ultra vires* contracts of municipal corporations, reported herein *ante*, p. 92.

ROBINSON, J.—On August 4, 1896, appellant's trustee was engaged in erecting a suitable and necessary school house in a certain school district having about 40 children of school age, and having no suitable school house. The contract price of the building was $1,300. The township had no funds belonging to the special school fund with which to pay for the completion of the building, and it required $500 to complete the building. The trustee represented to appellee that it was necessary for him to have such sum, and at the trustee's request, and for the purpose of completing the building, appellee turned over to the trustee that sum, which was used in paying for the erection of the building under the contract, and was paid by the trustee to the contractor for the purpose of paying for the completion of the building, and that the township since that time and now retains the benefit derived from the use of such sum in the use of such school house for school purposes; that such sum was not in excess of the fund on hand to which the debt is chargeable and the fund derived from the tax assessed for the year 1896. The trial court held that appellee ought to be subrogated to the rights of the contractor to the extent of $500, with interest.

The right of subrogation is not founded upon contract, express or implied. It is based upon the principles of equity and justice, and includes every instance where one party, not a mere volunteer, pays for another a debt for which the latter was primarily liable, and which in good conscience and equity he should have paid. See Spaulding v. Harvey, 129 Ind. 106, 28 N. E. 323, 13 L. R. A. 619, 28 Am. St. Rep. 176; Huffmond v. Bence, 128 Ind. 131, 27 N. E. 347; Sidener v. Pavey, 77 Ind. 241; Gerber v. Sharp, 72 Ind. 553; Rooker v. Benson, 83 Ind. 250. The findings show that the money received by the trustee was paid out by him for property actually received by the school corporation and retained by it. The contract for building the house was such a contract as the trustee was authorized to make. The money was advanced to the trustee for the purpose of completing a necessary and suitable school house. The trustee had not the means in hand to complete the building, and the money advanced was, in fact, applied to that purpose. To permit a recovery in such a case is in no way recognizing a general power in the trustee to borrow money. There is no suggestion whatever of any fraud in the building of the house. Appellant has received and retains the benefit of the money so advanced, and the simplest principles of equity and justice require that it should repay it. See Bicknell v. School Tp., 73 Ind. 501; Wallis v. School Tp., 75 Ind. 368; First Nat. Bank of Crawfordsville v. Union School Tp., 75 Ind. 361; Pine Civil Tp. v. Huber Mfg. Co., 83 Ind. 121; School Tp. v. Dodson, 98 Ind. 497.

The court found that appellee is entitled to 6 per cent. interest from August 4, 1896, to December 20, 1899. The court found that payment was demanded before suit, but does not find the date of the demand. We have held appellee liable for the amount on the ground that the money was advanced for the purpose of completing

the building, and that it was in fact applied to that purpose. Appellee would be entitled to interest from the time the money advanced was actually used. There is a finding that the money was paid to the contractor. But there is no finding when it was so paid. The township did not necessarily have the use of the money from the day it was turned over to the trustee. It did have the use of the money from the time it was paid to the contractor for the completion of the building. But this date is not found. From the findings, interest should have been allowed only from the date of the filing of the suit. The amount of interest from August 4, 1896, to the date of filing the complaint, February 7, 1899, \$75.25, is excessive. If appellee will within 30 days from this date remit \$75.25 as of the date of the judgment, the cause will be affirmed; otherwise, reversed.

REID v. RIGBY & CO.

[1894] 2 Q. B. 40.

APPEAL by the plaintiff from the decision of the judge of the Westminister County Court, in favor of the defendants, in an action brought by the plaintiff, to recover £20 on a cheque, and, secondly, to recover the same sum as money received by the defendants to the use of the plaintiff. The cheque in question was signed "Rigby & Co. per procuration of J. Allport, manager," and was drawn on May 21, 1892. The claim was made after Allport's death. It was found by the county court judge that Allport had been the manager of the defendant's firm, and had authority to draw on their banking account for the purposes of their business, but had no authority to overdraw their account, which he had overdrawn, or to borrow money on their behalf. It was also found that Allport had borrowed this sum of £20 for his own purposes, in order to replace money of the defendant's which he had abstracted. The evidence showed that Allport had obtained the cheque from the plaintiff by a statement that he was short of money, and wanted the money to pay the wages of the defendant's workmen, and it was shown that he had paid the money into the defendant's account at their bank, and had used it to pay the wages of their workmen.

CHARLES, J.—* * * [1] In my opinion, the true inference is that the money which was borrowed for wages was paid into the defendant's banking account, and was applied in payment of wages. The question is whether the plaintiff can recover that money from the

[1] After holding that no action could be maintained upon the checque, by sec. 25, of the Bills of Exchange Act, 1882, because by that section a signature by procuration is notice that the agent has only limited authority to sign, and the principal is bound by such signature only to the extent of the actual authority of the agent.

defendants. It is contended on behalf of the defendants that he cannot, on the findings of the county court judge to which I have referred, and also on a further finding, that Allport borrowed the money for his own purposes, in order to replace money belonging to the defendants which he had abstracted. I was at first somewhat embarrassed by that finding; but on consideration I have come to the conclusion that it does not affect the legal position of the parties. Allport has paid the money in to the defendants' banking account; and either it is there now or it has been paid in wages to the defendants' workmen. The latter, I think, is the true inference; but in either case I think the result is the same. Suppose that Allport had paid the money direct to the workmen, and had asked the defendants to repay him, could the defendants have refused? It seems to me, that if the wages had been so paid, then, when the defendants had discovered the fact of payment, they must have either repudiated such payment or adopted it. By accepting the benefit of the payment they would adopt it. It comes to this, that either the workmen have been paid or they have not. If they have been paid, the money so paid was in contemplation of law money received by the defendants to the use of the plaintiff; for either they have ratified the payment, or, if the money is still in their bank, it is the money of the plaintiff. I am of opinion that the decision in Marsh v. Keating, 1 Bing. N. C. 198, supports this view. In that case the money sought to be recovered was the proceeds of the fraud of Fauntleroy. The defendants, who had been Fauntleroy's partners, knew nothing of the fraud; but the judges who advised the House of Lords expressed a unanimous opinion that it must be treated as money received by the defendants to the use of the plaintiff, because it came into the possession of the defendants. The same view applies to the present case. Further than this, the defendants have since had an opportunity of finding out that the money had been paid in to their account. For these reasons I am of opinion that this sum of £20 was money received by the defendants to the use of the plaintiff. I will not say what the result might have been if the money had been paid in to the bank under some binding contract between Allport and the defendants. However it was paid in, it has found its way into the possession of the defendants, and therefore it was money received to the use of the plaintiff, which he is entitled to recover, and the appeal must be allowed. [Concurring opinion by COLLINS, J.] [1]

[1] In Bannatyne v. MacIver, [1906] 1 K. B. 103, there was recovery by subrogation in equity under like circumstances.

In Deery v. Hamilton, 41 Iowa 16 (1875), an executor borrowed money without authority. The court said (p. 18): "The estate has received the benefit of the money which was advanced by the defendant. It ought in good conscience to repay it with legal interest. This is not required because of the contract under which the money was borrowed, which is invalid, but on the ground that the estate has had the benefit of the money received from defendant." See also 23 Har. L. Rev. 228, note.

CARPENTER v. UNITED STATES.

17 WALL, 489.—1873.

APPEAL from the Court of Claims; the case as found by that court having been thus: In July, 1863, Major Hunt, of the corps of engineers, entered into negotiations with one Carpenter, owner of an island in Narragansett Bay, for the purchase of it by the United States for military uses; and a parol contract for the purchase and sale was then concluded; the terms being approved by the Secretary of War. The price as stipulated, was $21,000. In August following, the officers of the government, with the consent of Carpenter, entered into possession of the island and began to prepare for fortifying it. *The possession then taken they have ever since retained.* Upon examination, however, it was found and so reported by the Attorney-General, that under an act of May 1st, 1820, 3 Stat. at Large 568, an executive department had by law no authority to purchase land on account of the government. Consequently the verbal arrangement with Carpenter remained unconsummated, until 1866. On the 12th of June, of that year, Congress made an appropriation for the purchase of sites then occupied, and proposed to be occupied for sea-coast defense, and on the 7th of August next following, the purchase-money of the island ($21,000) was paid to Carpenter, and *accepted by him without any claim for interest or rents, so far as it appeared, and he delivered a deed for the property to the United States.* In this state of things Carpenter now, December 7th, 1867, filed a petition in the Court of Claims, claiming compensation from the United States for the use and occupation of the island from the time the United States officers, with his consent, took possession, after the verbal arrangement to purchase, until the deed was made and the purchase-money was paid, that is, from August, 1863, to August, 1866. The question was whether, upon the case stated, an action for use and occupation could be sustained.

The Court of Claims, as appeared by its opinion, 6 Court of Claims 162, considered that the law (i. e., the statute of 11 George II, chapter 19, sec. 14) which gives the action for use and occupation always required that some contract of demise should subsist; in other words, that the relation of landlord and tenant must be established; [it having been held in Brett v. Read (1 W. Jones 329) that where there had been an actual lease, action for use and occupation would not lie, the statute of 11 George II, chapter 19, sec. 14, enacted that—

"It should be lawful for a landlord, where the agreement was not by deed, to recover a reasonable satisfaction for lands, tenements, or hereditaments held or occupied by the defendant, in an action on the case for the use and occupation of what was so held or enjoyed; and if, on the trial of such action, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved,

should appear, the plaintiff in such action should not therefore be nonsuited, but might make use thereof as an evidence of the *quantum* of damages to be recovered." *Rep.*]; that there was no such relationship here. That independently of this the claim rested on an implied contract, but that where there was an express contract to buy, a contract to pay rent could not arise by mere inference. Relying on these views, and citing the English case of Kirtland v. Pounsett, 2 Taunton 145, it accordingly decreed a dismissal of the petition. From that decree the claimant appealed.

MR. JUSTICE STRONG.—Though it has sometimes been said that an action of debt, or assumpsit, for the use and occupation of land, can be maintained only when the relation of landlord and tenant has existed between the plaintiff and defendant, this is not strictly accurate, if it be meant that a demise must be in fact proved. It is true that the statute of 11 George II, chapter 19, sec. 14, enacted that the action might be sustained when a demise has been proved, but the action existed before the statute was enacted, and the only effect of the statute was to enlarge its sphere. Privity of contract is doubtless essential in all cases. But when the defendant has entered and occupied by permission of the plaintiff, without any express contract, the law implies a promise on his part to make compensation or pay a reasonable rent for his occupation. In such a case, the consent of the owner to the defendant's entry, followed by such entry and by subsequent occupation, may be considered equivalent to a demise, or at least *prima facie* evidence of a demise. This is because a demise with a corresponding agreement to pay rent, or make compensation for the use of the property, is consistent with an unexplained entry by the owner's consent, and because it is a reasonable presumption that the occupation thus taken was intended to be paid for. No reason, however, for such an implication exists, when an express contract or an arrangement between the parties shows that it was not intended by them to constitute the relation of landlord and tenant, but that the occupation was taken and held for another purpose. And this is shown when the entry has been made in pursuance of an agreement to purchase, whether that agreement was in writing or in parol. Such an agreement sufficiently explains the allowed entry, without the necessity of resorting to any implication of a contract other than that actually made. Accordingly it was ruled in Kirtland v. Pounsett, 2 Taunton, 145, that an action for the use and occupation cannot be maintained against one who took possession under a contract of sale, which failed afterwards to be consummated, in consequence of the vendor's inability to make title. It is true it appeared in that case the purchase-money had been paid, and by the use of it the vendor might have been regarded as compensated for the defendant's occupation, yet C. J. MANSFIELD said: "A contract cannot arise by implication of law under circumstances the occurrence of which neither of the parties ever had in contemplation." The same principle was asserted in Rumball v. Wright, 1

Carrington & Payne, 589. And in the later case of Winterbottom v. Ingham, 7 Adolphus & Ellis, New Series, 611, the same doctrine was declared, though the purchase-money had not been paid, and the reason given was, that when the defendant was let into possession, both parties understood that he made no promise to pay rent. The holding was in the expectation that title would be made and the purchase completed. There are other decisions to the same effect. It is true that in Howard v. Shaw, 8 Meeson & Welsby 118, it was held that after a contract of sale had been rescinded, an action for use and occupation might be maintained against a defendant who had remained in possession with the consent of the owner, but without any title or contract for the purchase of the land, and that a recovery might be had for the possession retained after the contract of purchase was terminated. But he was not held liable for rent during the time the contract subsisted, and he could not have been for the obvious reason that the contract was inconsistent with any understanding that rent was to be paid. And no case can be found, it is believed, in which one who entered in virtue of an agreement or understanding that he was to be a purchaser, has been held liable in an action for the use and occupation of the land, if the purchase was actually concluded.

It is contended, however, on behalf of the present plaintiff, that the contract of purchase under which, or in the expectation of the completion of which, the United States entered, and under which they continued to hold until the deed was made and the purchase-money was paid, was invalid, that until the act of Congress of 1866 was passed, no executive department had authority to purchase the island, and that, therefore, there was no legal contract for the purchase in existence until the deed was made and the price paid. But if this be conceded, it can make no difference. Let it be that neither party could have enforced the parol arrangement, it is still true that it was utterly inconsistent with any understanding that the parties contemplated the one was to pay and the other was to receive rent for the occupation of the property. The understanding of the parties is the material thing. Unless it was in their contemplation that compensation, other than the price stipulated to be paid for the transfer of the title, should be made, as C. J. MANSFIELD said, in Kirtland v. Pounsett, a contract to pay rent cannot arise by implication of law.

The plain common sense of the case is, that if the plaintiff was entitled to anything beyond what he has received, it was to interest on the purchase-money from the time the possession was taken until the price of the sale was paid. That he should have demanded before he delivered his deed. Not having done so, but having accepted the principal and consummated the sale, he cannot now assert that the relation in which his vendee stood to him was that of a tenant to a landlord, and recover interest in the shape of damages for the breach of an implied promise to pay rent for the use and occupation

of the island. There is no room in the facts found by the Court of Claims for the implication of any such promise.

Judgment affirmed.[1]

---

b. Mistake of Law.

i. *In General.*

CLARKE v. DUTCHER.

9 Cow. (N. Y.) 674.—1824.

On error from the Court of Common Pleas of Otsego county. Dutcher sued Clarke on the 8th of January, 1821, by summons, in a justice's court of that county; and declared that he, Dutcher, then was, and had been from the spring of 1785, in the possession and occupation of lot No. 36 containing 100 acres, in the Cherry Valley patent, as a tenant to Clarke, at an annual rent of 6d. sterling an acre, or £2 10 sterling for the whole lot; that the defendant Clarke, from that time to the present had demanded, and the plaintiff Dutcher had been obliged to pay, and had paid £4 14 York currency per year for the annual rent, to the defendant, being about 64 cents more than the actual rent reserved on the lot; and that when the plaintiff took possession, there was rent due on the lot from 1741, which the plaintiff had been obliged to pay, and had paid at the same rate; and which was more than the annual rent reserved on the lot. The second count stated the same facts, and added that the plaintiff paid the money in ignorance of his own rights. The third count was for the interest paid by the plaintiff at different times on the rent. The fourth count was for compound interest paid on the same rent. The fifth and last count was for money lent, money paid, etc., and money had and received generally. Pleas, the general issue, also the statute of limitations to all the plaintiff's demand except for the last six years, also the statute of limitations to the whole demand, also a set-off for rent due on the same lot. The jury found a verdict for the plaintiff with $50 damages, upon which the C. P. rendered judgment with costs; and the defendant brought error to this court.

Curia per Sutherland, J.—* * * But although this view of the case,[2] if I am correct in it, is conclusive, it may be well briefly to consider that which, upon the argument, was treated as the main point in the cause. It is embraced in the exception, that the payments made by the defendant in error were made voluntarily, with a full knowledge of all the facts in the case; and admitting that they exceeded the amount legally due, and that the statute of limitations

[1] For a further discussion of assumpsit for use and occupation of land, see cases on waiver of trespass to land, *post*, p. 618.

[2] As to the statute of limitations.

was out of the question, the excess could not be recovered back, the mistake being in law and not in fact.

Although there are a few *dicta* of eminent judges to the contrary, I consider the current and weight of authorities as clearly establishing the position, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of law; and it shall be considered a voluntary payment.

This position was broadly stated by BULLER, J., in Lowry v. Bourdieu, Doug. 470, without any question, or the expression of any doubt or disapprobation by the rest of the judges. Although it is true that that case may have been, and probably was determined on the ground that the policy upon which the premium had been paid was a gaming policy, that the parties were in *pari delicto,* and that the law would not aid the plaintiff in recovering back what he had paid under such circumstances; still it is not to be supposed that Lord MANSFIELD and Mr. Justice ASHURST would have suffered the *dictum* to have passed without animadversion, if they had not assented to its correctness.

In Knibbs v. Hall, 1 Esp. 83, a tenant was not permitted to recover back from his landlord, or to be allowed by way of set-off, a sum of money which he had paid beyond the rent which was actually due from him. The landlord demanded 25 guineas, and threatened him with a distress if he did not pay it. The tenant insisted that he had taken the premises at 20 guineas, and offered to pay that sum; but under the supposition that he could not defend himself against the distress, paid the 25 guineas, and was not permitted to recover back or set off the excess, it being held a voluntary payment. So in Brown v. McKinnally, 1 Esp. 279, and Marriott v. Hampton, 2 Esp. 546, the same principle was recognized.

In Buller v. Harrison, Cowp. 555, the money was paid under a mistake in fact. The assurer, upon a representation that a loss had been sustained by one of the perils covered by the policy, paid the insurance to the agent of the assured. But soon learning that it was a "foul loss," in the language of the case, he gave notice to the agent of the fact, and also not to pay over the money. The only question discussed in the case was, whether in judgment of law the money had been paid over by the agent before he received the notice. The plaintiff's right to recover against the principal was not questioned.

The case of Bilbie v. Lumley and others, 2 East 469, was also an action by an underwriter, to recover back from the assured £100 which he had paid upon the policy. The ground upon which the action was brought was, that the money had been paid under a mistake, the defendant not having disclosed to the plaintiff, at the time the insurance was effected, a letter relating to the time of the sailing of the ship insured, which it was admitted was material. But it appeared that, before the loss was adjusted and the money paid

on the policy, all the papers, including the letter in question, were submitted to the plaintiff. The counsel for the plaintiff put his case on the broad ground that it was sufficient to sustain the action that the money had been paid under a mistake of the law, the plaintiff not being apprised at the time of the payment, that the concealment of the particular circumstance disclosed in the letter was a defense to any action which might have been brought on the policy. When the case was stated at bar, Lord ELLENBOROUGH would not hear it argued. He said he had never heard of a case in which a party who had paid money to another voluntarily, with a full knowledge of all the facts of the case, had been permitted to recover it back, on account of his ignorance of the law, except the case of Chatfield v. Paxton (in a note to Bilbie v. Lumley), in which Lord KENYON, at *nisi prius,* had dropped an intimation of that sort. Now, upon examination, it will be found that in the case of Chatfield v. Paxton, a majority of the judges put the case upon the ground that the payment had been made by the plaintiff, not with a full knowledge of facts, but only under a blind suspicion of the case. Lord ELLENBOROUGH says that it was so doubtful on what point that case turned, that it was not ordered to be reported.

In Stevens v. Lynch, 12 East 38, the plaintiff was the indorser, and the defendant the drawer of a bill of exchange. The defense was, that the plaintiff had given time to the acceptor after his dishonor of the bill. But it appeared that the defendant, with a full knowledge of that fact, said, "I know I am liable, and if Jones (the acceptor) does not pay it, I will." The court say the defendant made the promise with a full knowledge of all the circumstances, and cannot now defend himself upon the ground of his ignorance of the law when he made the promise.

The cases of Chatfield v. Paxton and of Bize v. Dickason, 1 T. R. 285, were cited for the plaintiff upon the argument. But the court said they considered those cases to have proceeded on the mistake of the person paying the money under an ignorance or misapprehension of the facts of the case.

In the late case of Brisbane v. Dacres, 5 Taunt. 144, this subject was elaborately considered by the Court of Common Pleas, and the principle of Bilbie v. Lumley recognized and adopted. Brisbane was the captain of a frigate belonging to a squadron under the command of Admiral Dacres, the testator of the defendant, upon the Jamaica station; and in obedience to the orders of the admiral, in April, 1808, he received on board his frigate $700,000 belonging to government, and proceeded with the same to Portsmouth. He also received on board between one and two million of dollars belonging to individuals, to be delivered at the Bank of England. The government and individual money was delivered according to order, and Captain Brisbane received from the government for the freight of the former £850; and from the Bank of England, upwards of £7000 for the freight of the latter. He paid over to the admiral one-third of the sums thus received, under the belief that he was legally en-

titled to it; but upon discovering that he was not, he brought this action to recover it back. It was shown to be the usage in the navy for the captains of vessels carrying public and private treasure, to pay one-third of the freight for the same to the commander of the squadron to which they belonged, though it was admitted that since 1801 the admiral had in such cases no legal claim to any portion of the allowance. But the court held that the money, having been paid with a full knowledge of all the circumstances and facts in the case, could not be recovered back, because it had been paid under a misapprehension of the law. As to the freight for the money belonging to individuals, it was held that Captain Brisbane had no right to carry it; that the whole of that part of the transaction was illegal; and that, the parties being *in pari delicto,* the law would aid neither. But as to the other portion of the demand, it was put upon the broad ground which I have stated, against the opinion of Mr. Justice CHAMBRE. Mr. Justice GIBBS says, where a man demands money of another as a matter of right, and he pays it with a full knowledge of the facts upon which the demand is founded, he never can recover back the sum he has so voluntarily paid. By submitting to the demand, he that pays the money *gives* it to the person to whom he pays it, and closes the transaction between them. He who receives it has a right to consider it as his without dispute; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover back the money.

Against these cases and a variety of others in which the same principle is acknowledged with more or less distinctness, there is nothing to oppose but the *dictum* of DE GREY, Ch. J., in Farmer v. Arundel, 2 Bl. R. 825, and of Lord MANSFIELD in Bize v. Dickason, 1 T. R. 285. The observation of Ch. J. DE GREY is, that "When money is paid by one man to another, as a mistake, either of fact or of law, or by deceit, an action will lie to recover it back." But in that case the action was not sustained, although the money had been paid by the plaintiff under a clear mistake of law. The case, therefore, not only did not call for the *dictum,* but is in direct hostility with it. The proposition of Lord MANSFIELD in Bize v. Dickason was, that "Where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back in an action of assumpsit." If his Lordship meant mistake in fact, the proposition is undoubted; and that he did so mean and express himself, Mr. Justice GIBBS, in his opinion in Brisbane v. Dacres, infers with great force, from the circumstance that Lord MANSFIELD had six years before, in Lowry v. Bourdieu, heard it said by Mr. Justice BULLER, that "money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and BULLER, Justice, sat by him in Bize v. Dickason, and would not have heard the contrary of that doctrine stated without noticing it. The only point to which the attention of the defendant's counsel, in

Bize v. Dickason, seems to have been directed was, whether the case came within the principle of Grove v. Dubois, 1 T. R. 112; and the court having expressed an opinion that it did, he abandoned the case, without adverting to the distinction that in Grove v. Dubois the broker had been allowed merely to set off his demand, and here he sought to recover back a sum which he had actually paid.

Chief Justice MANSFIELD, in Brisbane v. Dacres, in adverting to these propositions of Ch. J. DE GREY and Lord MANSFIELD, says, "It certainly is very hard upon a judge, if a rule which he lays down generally is to be taken up and carried to its full extent. Great caution ought to be used by the court in extending such maxims to cases which the judge who uttered them never had in contemplation."

If money paid under a mistake of the law, though with a full knowledge of the facts in the case, can be recovered back in all cases where the party to whom it is paid is not in conscience and equity entitled to it, what is the practical distinction between a mistake in fact and a mistake in law? A party who has paid money under a mistake in fact cannot recover it back unless he is equitably entitled to it. The inquiry in every case, therefore, must be, not whether the money was paid under a misapprehension of the law, or in ignorance of the fact, for that is immaterial, but whether the party to whom it was paid can in equity and conscience retain it. If he cannot, if there was any mistake of any character, he shall refund.

If this be so, why has this question been so frequently and elaborately discussed, not only in the English, but in our own courts; and not only in the courts of common law, but in courts of equity? How are the cases of Bilbie v. Lumley and Brisbane v. Dacres to be reconciled with this principle? What ground of conscience or equity had Admiral Dacres for retaining the money paid to him? He had neither incurred hazard nor rendered any labor or service in its transportation. Captain Brisbane was not his servant; nor was the ship which carried it his property. Chief Justice MANSFIELD, in his solicitude to avoid collision with the *dicta* of Chief Justice DE GREY and Lord MANSFIELD, does indeed suggest a ground of equity for the defendant. He says, "So far from its being contrary to *aequum et bonum,* I think it would be most contrary to *aequum et bonum* if he were obliged to repay it; for see how it is: If the sum be large, it probably alters the habits of his life; he increases his expenses; he has spent it over and over again; perhaps he cannot pay it at all, or not without great distress." If the fact of having expended the money, or of its being inconvenient to repay it, is a sufficient ground of equity to enable the party who has received it under a mistake of law to retain it, I apprehend that it will practically amount to the same thing as holding that it shall not be recovered back. But with great respect, I think his Lordship might better have denied those *dicta* to be law, as Lord ELLENBOROUGH did in Bilbie v. Lumley, than to have sought to evade them by this gloss.

Chief Justice MARSHALL thought there was a distinction between a mistake in fact and a mistake in law, when he said, in Hunt v.

Rousmanier, 8 Wheat. 215: "Although we do not find the naked principle that relief may be granted, on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." Chancellor KENT thought such a distinction existed, when he said, in Lyon v. Richmond, 2 Johns. Ch. 51, "Courts do not undertake to relieve parties from their acts and deeds fairly done, on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law; there is no other principle which is safe or practicable in the common intercourse of mankind." The principle upon which courts refuse to relieve against mistakes in law is, that in judgment of law there is no mistake; every man being held, for the wisest reason, to be cognizant of the law. The act, therefore, against which the party seeks relief is his own voluntary act, and he must abide by it. This principle steers entirely clear of the conscience or equity of the transaction.

In this case, therefore, the rent having been reserved in sterling money, and its value in our currency being fixed by statute, and therefore a question of law, if the plaintiff, on settling his rent at the rate of £4 14s. currency for £2 10s. sterling, acted under an erroneous impression that that was its legal value, he cannot now recover back the excess. The rent was demanded by the landlord as his right. By submitting to the demand, as Mr. Justice GIBBS expressed it, he *gives* the money to the party to whom he pays it, and closes the transaction forever. The judgment of the common pleas must be reversed

Judgment of reversal.[1]

[1] In Scott v. Ford, 45 Ore. 531 (1904), there is an extended reconsideration of the question of the recovery of money paid under mistake, either of fact or of law, with a review of all the principal authorities. In Cooper v. Phibbs, L. R. 2 H. L. 149, 170 (1867), Lord WESTBURY, in his opinion, says: "It is said, '*Ignorantia juris haud excusat;*' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand." In Alton v. First Nat. Bank, 157 Mass. 341, 343 (1892), HOLMES, J., comments upon the above statement as follows: "Lord WESTBURY sometimes is supposed to have taken a distinction as to the effect of a mistake of law according to whether the mistaken principle is general or special. Cooper v. Phibbs, L. R. 2 H. L. 149, 170. But in the often-quoted passage of his judgment he only meant that certain words, such as ownership, marriage, settlement, etc., import both a conclusion of law and facts justifying it, so that, when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion, and a mistake induced by such an assertion is a mistake of fact. In the case before him the mistake was one concerning

HEMPHILL v. MOODY.

64 Ala. 468.—1879.

Appeal from the Chancery Court of Tuskaloosa.

Stone, J.—It is a maxim born of necessity, that all men are conclusively presumed to know the law. Without this, legal accountability could not be enforced, and judicial administration would be embarrassed at every step. The necessity of this rule is more felt and acknowledged in criminal accountability, than in mere civil obligations. As a corollary, there has grown up another maxim, that courts will not reform or redress those acts of parties, which are the result of pure mistake of law. Jones v. Watkins, 1 Stew. 81; Trustees v. Keller, 1 Ala. 406; Haden v. Ware, 15 Ala. 149; Dill v. Shahan, 25 Ala. 694; Town Council of Cahaba v. Burnett, 34 Ala. 400; Lesslie v. Richardson, 60 Ala. 563. But, in civil proceedings, this rule, owing to its hardship, has been treated as one *stricti juris;* and if there was intermixed with the mistake of law any mistake of fact, courts have willingly seized upon it, and made it the ground of relief. There is a class of cases, hard to distinguish from mistakes of law, where, through mistake, a written agreement contains substantially more or less than the parties intended, or where, from ignorance or want of skill in the draughtsman, the object and intention of the parties, as contemplated by the agreement, is not expressed in the written instrument, by reason of the use of inapt expressions; in which the Court of Chancery, on clear and satisfactory proof of the mistake, will reform such agreement, and make it conform to the true intention of the contracting parties. 1 Brick. Dig. 681, §§ 606, 610. The principle on which courts relieve, in cases falling within this class, is that through ignorance or misapprehension of the legal effect of the terms agreed upon, the parties have made a contract variant in legal construction from the one intended. Trapp v. Moore, 21 Ala. 693; Larkins v. Biddle, 1 Ib. 252. We refer to this class of cases, not because they shed any direct light on the case in hand, but because they show that courts seize upon small circumstances, to relieve parties of a hard, though necessary rule. And there are other cases in which this rule is relaxed. Hardigree v. Mitchum, 51 Ala. 151.

In the present case, Moody, the administrator of Sims, paid to the administrator of Aaron Ready $2,000, the sum of a pecuniary legacy bequeathed by the will of Sims. In the case of Hemphill v. Moody,[1] we held this payment was unauthorized, and that Moody was not entitled to a credit for it in his settlement as administrator of Sims. One purpose of the present bill is to have that payment applied to

the ownership of a fishery, and was induced by a general statement of a certain person that he owned it. L. R. 2 H. L. 164. Windram v. French, 151 Mass. 547, 551."

[1] 62 Ala. 510.

the extinguishment of the distributive interest of Aaron Ready's children in said estate. The averments of the bill are, that the children of Aaron Ready and the children of Jerusha Ready, his wife, daughter and legatee of testator Sims, are the same; that they are insolvent; that the $2,000 paid by mistake to Aaron Ready's administrator, were distributed and paid, less expenses of administration, to said children of Aaron and Jerusha Ready; that in this way they, the children—distributees alike of Aaron and Jerushy Ready—have received of the moneys of complainant more than their share of the undistributed assets of the estate of testator Sims, and that it is contrary to equity and good conscience that they should again receive payment out of the private purse of complainant Moody. The answer, if we were allowed to look to it, denies that the children of Aaron Ready and the children of Jerusha Ready, are entirely the same; sets up, that after the death of Jerusha Ready, Aaron married a second time, and left issue by the second marriage, who shared in the distribution of the $2,000 paid to Ready's administrator. In the present state of the record, and on the present appeal, we cannot know or inquire how this question stands. Only the averments of the bill are before us. Taking those averments as a guide, the share of the undistributed assets of testator's estate to which Mrs. Ready's administratrix is entitled, is $1,100 or $1,200. There is no averment in the bill showing the amount of the $2,000 distributed and paid to the distributees of Aaron Ready, which went to the distributees of Jerusha Ready. Guided, however, by the bill, the sum distributed and paid to them exceeds the distributive share of Jerusha Ready's estate in the undistributed assets. The bill avers that Jerusha Ready died many years ago; that her estate owes no debts, and that the only function and duty her administratrix will be required to perform, is the distribution of her intestate's distributive share among her distributees, next of kin.

We do not think this case, so far as it seeks relief against Jerusha Ready's distributees, stands on the naked principle of a suit to recover back money paid under a mistake of law. The bill makes no effort to recover the money back. Its object is, to have a payment, actually made, applied in extinguishment or reduction of a debt or liability actually due and owing. Guided, as we have said, by the averments of the bill, Moody, the complainant, was liable to pay—was indebted—to Jerusha Ready's estate, to be distributed and paid to her next of kin, $1,100 or $1,200; no more. He has paid, and they have received a larger sum than that, to which they had no other rightful claim. They cannot demand a second payment, on the technical ground that, when the payment was made, it was erroneously supposed to be due on another account. Payment discharges a debt, no matter when, or by whom made. * * *

[1] In Phillips, Ex'r, v. McConica, 59 Ohio 1 (1898), an executor who paid, under mistake of law, a legacy to one not entitled was not allowed to recover back, there being no mistake of fact.

PITCHER v. THE TURIN PLANK ROAD COMPANY.

10 BARB. (N. Y.) 436.—1851.

APPEAL by the defendants from a judgment of the county court of Lewis county, affirming the judgment of a justice of the peace. The action was brought by the plaintiff, after attaining full age, to avoid an agreement made during infancy for the compromise of a suit with which he was threatened, and to recover back money paid in pursuance of such agreement. The justice rendered a judgment in favor of the plaintiff for $10 and costs.

GRIDLEY, P. J.—The plaintiff in the justice's court sued the plank road company to recover back the sum of $10, which he had paid to compromise or settle a threatened suit against him, for the penalty of $25 for running the gate of the defendant. It is true the plaintiff would be liable at common law for the trespass; but the justice must have found that the compromise was made under the mistaken supposition that he was liable for the penalty of $25; and that finding, even if founded on less conclusive evidence than it is, would be binding on this court. Noyes v. Hewitt, 18 Wend. 141; Stryker v. Bergen, 15 Wend. 490.

The mistake was mutual; both the agent of the company and the plaintiff supposed that the clause giving the penalty, in the turnpike act, had been incorporated into the plank road act, of 1847. The mistake therefore was not a pure mistake of law. It was in one sense a mistake of fact. Neither party supposed that a penalty of $25 was given by the common law. Neither party had any doubt that if the statute had given a penalty for running a gate situated on a plank road, the penalty was collectible. Both parties assumed that a section giving the penalty had been incorporated into the plank road act. In that assumption they were mistaken. It cannot be doubted that this mistaken belief was a powerful motive with the plaintiff in making the settlement. If he could compromise a liability for $25 by the payment of $10, we can all see it would be a wise and prudent act to do so. Whereas he might be willing to take his chance of a suit at common law, where the damages might be nominal only.

No one will dispute the general proposition that ignorance of the law excuses no one,—every man being presumed to know the law. But I do not think that rule applies to the present case. This, as I before remarked, is not a case of pure mistake of law. It was a compromise of a claim for a penalty, which the law did not give. It was not a compromise of a doubtful claim, but of a claim for which there was no foundation at all, when it was ascertained that the penalty in question had not been applied to plank roads. It was a case where the settlement was made under the mistaken idea that the act giving the penalty had been applied to plank roads. In such cases the rule that no man is excused by reason of ignorance of the law does not apply. The daughter of a freeman of London had a legacy of

£10,000 left her by the will of her father, on condition she should release her orphanage share. She accepted the legacy and executed the release. This release was set aside, although no fraud was imputed to the executor, the orphanage share being £40,000. Judge STORY says "it was a case of clear surprise in matters of fact as well as law," 1 Story Eq. §§ 117, 118. So in Evans v. Llewellyn, 1 Story Eq. § 119, the decision was placed entirely on the ground of surprise, "the conveyance having been obtained and executed improvidently." Lord KENYON said "The party was taken by surprise. He had not sufficient time to act with caution, and therefore, though there was no actual fraud, it was something like fraud, for an undue advantage was taken of his situation. I am of opinion that the party was not competent to protect himself." The application of this doctrine to the case under consideration will be apparent when we remember that one of the parties was an infant, and the other party was threatening to make him pay the $25 "or put him through on it," unless he paid the $10.

Again: where one has a clear title, and under the idea of a compromise gives away a part of what was by law his own, he is entitled to relief. Not, however, where there is a disputed question, and the compromise is fair. Judge STORY says, "In the former cases the party seems to labor, in some sort, under a mistake of fact as well as of law. He supposes, as a matter of fact, that he has no title, and that the other party has a title to the property," Story Eq., § 130. In this case the plank road company claimed to have a clear right to the penalty of $25; and the plaintiff was induced to believe that they had such a right, by the mistaken supposition that such a claim was made applicable to the plank road act. Now when it turns out that this was a common error of both parties, the plaintiff is entitled to relief, on the ground that the mistake was one rather of fact than of law.

The decision may well rest upon the ground on which the county judge has placed it; viz. that this is a case where the acts of the infant may be inquired into for the purpose of seeing whether they are beneficial to his interest or not. This has been done by the justice, who determined that the settlement or compromise was not beneficial to his interests, and set it aside. In the case of Keane v. Boycott, 2 H. Black. 511, Lord Chief Justice EYRE laid down the rule that when the court could pronounce the contract to be for the benefit of the infant, as for necessaries, it was good; when the court could pronounce it to be for the prejudice of the infant, it was void; and in those cases where the benefit or prejudice was uncertain, the contract was voidable only. In the case of Grace v. Wilber, 10 Johns. 455, it was held that an infant was not liable to be enrolled in the militia, while under eighteen years of age. And though he agrees, with the consent of his father, to serve as a substitute for another, in consideration of a certain sum of money, which is paid, such a contract is not binding on the infant; and, the infant having deserted and having been apprehended as a deserter, brought his

action for trespass and false imprisonment against the officer arresting him, and recovered. Now upon these authorities, it was for the justice to decide whether the $10 were paid to settle the claim for the penalty, or to settle the whole claim against the plaintiff, for trespass at common law for running through the gate. He has found, as we must conclude, that the money was paid solely to settle the claim for the penalty, when no law existed making him liable to a penalty. Having come to that conclusion, he must have held that a settlement of a claim which had no legal existence, and the contract for the payment of $10, in liquidation of such a claim, was not beneficial to the infant. If the justice held thus, and we must presume that he did, then we are not at liberty to review his judgment. There was at least some evidence on which he founded his judgment. See 18 Wend. 141. This decision the county judge held to be binding on him; and we must regard it as conclusive upon us.

Judgment affirmed.[1]

NEEDLES v. BURK.

81 Mo. 569.—1884.

HOUGH, C. J.—The plaintiff sues the defendant to recover back from him the value of certain property which he alleges he delivered to the defendant, upon representations made by him to the plaintiff, that the plaintiff's infant son had carelessly and negligently set fire to and burned defendant's barn, of the value of $600, and upon the further representation that the plaintiff was liable for said damage, and that defendant's neighbors all regarded him as liable, and were urging him, the defendant, to sue plaintiff therefor, that being ignorant whether or not his infant son had set fire to and burned defendant's barn, and, also, of his rights and liabilities in the premises, and relying upon the representations so made to him by the defendant, which representations were made by the defendant without knowing them to be true, and which were, in fact, untrue, and which were made for the purpose of obtaining from the plaintiff

[1] Polites v. Barlin, 149 Ky. 376 (1912), holds that an infant boot-black may recover tips handed to him by customers and deposited in his employer's cash register, believing the employer entitled to them.

In Renard v. Fiedler, 3 Duer (N. Y.) 318, 323 (1854), the court in discussing the question of recovery of money paid under mistake of law or mistake of fact says: "We confess that we are not at all disposed to extend the doctrine, which makes a distinction between different causes of error, by denying a remedy in one class of cases which it grants in another, although in both the error, if not corrected, is equally a source of injustice. It is peculiar, and not very creditable to the system of jurisprudence that we have adopted and follow. It has, doubtless, sprung from the misapplication of the maxim that *"ignorantia legis neminem excusat."* That every man must be presumed to know the law is indeed a necessary rule in the administration of criminal justice, but its application to bar a civil remedy is not demanded by any reasons of public policy, and, in many cases, is a resort to a fiction, not for the purpose of promoting, but of defeating justice. Hence, courts of equity have long struggled against the doctrine and have excepted many cases from its operation; and we think that courts of law, when not bound down by precedents, may reasonably follow the example."

his said property, plaintiff delivered said property to the defendant in payment of said supposed liability. * * *

It is settled in this state that a father is not responsible for injuries inflicted through the negligence or wilful wrong of his minor child. Baker v. Haldeman, 24 Mo. 219. The plaintiff, therefore, was not liable to the defendant, Burk, for the value of his barn, even though it had been set on fire by the plaintiff's son. If the plaintiff's son had fired the barn, and in consequence thereof, but in ignorance of the fact that he was not legally liable therefor, the plaintiff had paid the defendant the amount of his loss, it would not be pretended that he could recover it back. But it is contended that, in addition to the mistake of law made by the plaintiff, he was induced by the misrepresentations of the defendant to believe that his son did fire the barn, and that, as this belief on his part caused him to pay the defendant the sum claimed, it constitutes such a mistake of fact as entitles him to recover back the sum paid.

There can be no question that where money has been paid under a mistake of fact, which causes an unfounded belief of a liability to pay, it may generally be recovered back, 1 Parsons on Con. 465 (6th Ed.). But it is also true that in order to entitle a person to recover back money paid under a mistake of fact the mistake must be as to a fact which, if true, would make the person paying liable to pay the money, not where, if true, it would merely make it desirable that he should pay the money. Aiken v. Short, 1 Hurlst. & N. Exch. 210. So, that if the alleged representation of the defendant to the plaintiff, that his son had burned his barn, was a mere mistake this would not of itself suffice to warrant a recovery. To entitle the plaintiff to recover, it should be shown, not only that the plaintiff's son did not burn the barn, but that the plaintiff was induced, by the representations of the defendant, to believe that his son did burn the barn, and that defendant did not believe his representations to be true, or knew that they were untrue; in other words, that such representations were fraudulently made. Where money is paid upon the fraudulent representation of a fact which, if true, would create no legal obligation, but would naturally excite emotions of benevolence, sympathy or compassion, and superinduce a sense of moral obligation which prompted the payment it is right and just that the party paying should be entitled to recover back the sum which he has thus been fraudulently induced to pay. If a simple mistake of fact which creates no legal liability, and which is wholly disconnected from any fraud, induce a payment of money to one who is lawfully entitled to compensation, but not from the party paying, while there may be a moral obligation to return the money, such moral obligation cannot be made the basis of an implied legal obligation which will sustain an action.

The judgment will be reversed and the cause remanded. All concur.[1]

[1] Contra, Bishop v. Corning, 37 App. D. (N. Y.) 345 (1899).

WILLIAM CULBREATH v. JAMES M. AND DANIEL G. CULBREATH.

7 Ga. 64.—1849.

Obadiah M. Culbreath died intestate leaving neither wife nor children. His nearest of kin were seven surviving brothers and sisters and the children of a deceased sister. William Culbreath, the administrator, under a misapprehension of the law, divided the estate equally between the seven brothers and sisters, to the exclusion of the children of the deceased sister. Subsequently, these children instituted suit against the administrator and recovered the one-eighth of the estate. The present action was by William Culbreath against two of the distributees, to recover back the amount overpaid on account of this mistake. Upon an agreed statement of the facts in the court below, the presiding judge awarded a nonsuit against the plaintiff, who appealed to this court.

Nisbet, J.—* * * * The question is, can a party recover back money paid, with a knowledge of all the facts, through mistake of the law?

We are fully aware that the authorities upon this question are in conflict, as well in England as in this country. Great names and courts of eminent authority are arrayed on either side. It is not one of those questions upon which the mind promptly and satisfactorily arrives at a conclusion. This is true in reference both to principle and authority. It is not surprising, therefore, that Judge Alexander and this court should differ. I think, and I shall try to prove, that the weight of authority is with us. If it were not so—if authorities were balanced—we feel justified in kicking the beam, and ruling according to that naked and changeless equity which forbids that one man should retain the money of his neighbor, for which he paid nothing, and for which his neighbor received nothing; an equity which is natural, which savages understand, which cultivated reason approves, and which Christianity not only sanctions but in a thousand forms has ordained. In ruling in favor of these actions, we aim at no visionary moral perfectibility. We feel the necessity of practicable rules, by which rights are to be protected and wrongs redressed. We know the necessity, too, of general rules, and how absurd would be that attempt, which seeks to administer the equity which springs from each and every case. The insufficiency which marks all lawgivers, laws, and tribunals of justice, makes that a hopeless thing. Still, where neither positive law nor a well settled train of decisions impose upon courts a prohibition, they are at liberty, nay, bound to respect the authority of natural equity and sound morality. Where these are found on one side of a doubtful question, they ought to cast the scale. Moreover, we believe that the rule we are about to lay down may be so guarded, as in its application to be both practicable and politic.

It is difficult to say that an action for the recovery of money paid by mistake of the law will not lie, upon those principles which govern the action of assumpsit for money hàd and received. Those principles are well settled since the great case of Moses v. Macferlan, in 2 Burrow 1005. The grounds upon which that necessary and most benign remedy goes, are there laid down by Lord MANSFIELD. This claim falls within the principles there settled, and cannot be distinguished from cases which have been ruled to fall within them, but by an arbitrary exclusion. I am not now using the case of Moses v. Macferlan as the authority of a judgment upon the precise question made in this record; although Lord MANSFIELD there held, that money paid by mistake could be recovered back in this action, without distinguishing between mistake of law and fact. I refer to it, to demonstrate what are the principles upon which the action is founded. It is not founded upon the idea of a contract. In answer to the objection, that assumpsit would lie only upon a contract, express or implied, Lord MANSFIELD said, "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as if it were upon contract." Again: "One great benefit derived to a suitor from the nature of this action is, that he need not state the special circumstances from which he concludes that *ex aequo et bono* the money received by the defendant ought to be deemed belonging to him."

"The defendant," says his Lordship, farther, "may defend himself by everything which shows that the plaintiff, *ex aequo et bono,* is not entitled to the whole of his demand, or to any part of it." His summary is in the following words: "In one word, the gist of this action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." In the language of the civilians, from whom Lord MANSFIELD borrowed many valuable principles, *"Hoc natura aequum est, neminem cum alterius detrimento fieri locupletiorem."*

If there is justice in the plaintiff's demand, and injustice or unconscientiousness in the defendant's withholding it, the action lies; or, to use more appropriate language, the law will compel him to pay. Now, when money is paid to another, under a mistake as to the payer's legal obligation to pay, and the payee's legal right to receive it, and there is no consideration, moral or honorary or benevolent, between the parties, by the ties of natural justice the payer's right to recover it back is perfect, and the payee's obligation to refund is also perfect,—it becomes a debt. It is a case fully within the range of the *ex aequo et bono* rule. This is that case. It falls within none of the exceptions mentioned by Lord MANSFIELD. It was not paid as a debt due in honor or honesty, as in case of a debt barred by statute; it is not paid as a donation; it was not paid as a debt contracted in violation of public law; for example, money fairly lost at play. In all such cases it is conscientious for the defendant to keep it. In this case there is no right or equity or conscience upon which

the defendant can plant himself. Why, then, is not the case of a payment by mistake of the law within the principles of Moses v. Macferlan?

Right here the argument might rest on principle. Just here the onus is cast upon the other side, to show how and why this case is distinguishable from other cases falling confessedly within the principles upon which the action for money had and received is based. We shall see upon what footing the distinction is placed by Lord ELLENBOROUGH. It is that of policy. The doctrine which I am now repelling never was defended upon principle; it never can be. No British or American judge ever attempted its defense on principle. It was ruled on policy, and followed upon the authority of a few precedents. A policy which, it must be conceded, does private wrong, for the sake of an alleged public good; or, I should more appropriately say, rather than risk a doubtful public evil. It was, no doubt, this view of the subject which startled the calm philasophical equity of Marshall's mind, when yielding, in Hunt v. Rousemanier, to precedent, he still gave in his personal protest against the doctrine. For what he said in that case can be viewed in no other light than as a personal protest. It is wise, it is necessary for courts to yield to established authority; but, inasmuch as the use of precedent is to illustrate principle, a single precedent or a number of precedents should not control, when they are against principle.

We guard this doctrine by saying, that the action is not maintainable, where money is paid through mere ignorance of the law, or in fulfillment of a moral obligation, or on a contract against public law, or on any account which will make it consistent with equity and good conscience for the defendant to retain it. Nor does the judgment of this court embrace cases of concealment, fraud, or misrepresentation. They depend upon principles peculiar to themselves. And farther, it is scarcely necessary to add that a recovery cannot be had, unless it is proven that the plaintiff acted upon a mistake of the law.

2. There is a clear and practical distinction between ignorance and mistake of the law.[1] Much of the confusion in the books, and

[1] Accord, Lawrence v. Beaubien, 2 Bai. (S. C.) 623 (1831); Hutton v. Edgerton, 6 S. C. 485 (1875). Doubted in Robinson v. City Council, 2 Rich. L. (S. C.) 317, 320 (1846), and in Cuningham v. Cuningham, 20 S. C. 317 (1883), where the court says (p. 332): "In this state, however, the distinction has been sharply drawn between ignorance of law and mistake of law. In Lawrence v. Beaubien, 2 Bail. 623, and in Lowndes v. Chisholm, 2 McCord Ch. 455, the court holding that in cases of mistake, the court could give relief, and that it would be refused in cases of mere ignorance. The principal reason given being that mistake could be proved and that ignorance could not. As parties can now testify in their own behalf, it may be doubtful if this reason can be longer sufficient to justify the distinction."

Contra, Jacobs v. Morange, 47 N. Y. 57 (1871). In Champlin v. Laytin, 18 Wend. (N. Y.) 407, 415 (1837), Bronson, J., says: "Lawrence v. Beaubien, 2 Bailey's S. Car. R. 623, is the only case I have met with where a distinction

in the minds of professional men, upon this subject, has grown out of a confounding of the two. It may be conceded, that at first view, the distinction is not apparent; but it is insisted that upon close inspection it becomes quite obvious. It has been ridiculed as a quibble; but we shall see that it has been taken by able men, and acted upon by eminent courts. Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake, but a mistake always involves ignorance, yet not that alone. The difference may be well illustrated by the case made in this record. If the plaintiff, the administrator, had refused to pay the distributive share in the estate which he represented, to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon a plea, that being ignorant of the law he is not liable to pay interest on their money in his hands. But the case is, that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief, by paying the money to them. The ignorance in this case of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake.

The distinction is a practical one, in this, that mere ignorance of the law is not susceptible of proof. Proof cannot reach the convictions of the mind, undeveloped in action; whereas, a mistake of the law, developed in overt acts, is capable of proof, like other facts.

3. The usual reply to all this is the time-honored maxim *ignorantia juris nòn excusat.* We do not make void this maxim in any fair construction of it. It is an indispensable rule of legal and social policy: it is that without which crime could not be punished, right asserted, or wrong redressed. What if its application does, in some cases, work injustice? Its overruling necessity, and the vast preponderance of its benefits over its evils, have reconciled the civilized world to its immovable status as a rule of action. The idea of excuse implies delinquency. No man can be excused upon a plea of ignorance of the law, for disobeying its injunctions or violating its provisions or abiding his just contracts. He is presumed to know the law, and if he does not know it, he is equally presumed to be de-

was attempted between *ignorance* and *mistake* of the law, and holding that in the latter case, though not in the former, relief might be granted. I think the distinction rests on no solid foundation. Whether money paid in ignorance of the law could be recovered back was elaborately discussed by the counsel in Haven v. Foster, 9 Pick. 112, but the decision turned upon another point. The court, however, assert the principle, as applicable alike to civil and criminal proceedings, that every man is presumed to know the law of the land. Wheaton v. Wheaton, 9 Conn. R. 96, and Hunt v. Rousmanier, 1 Peters 1, both affirm the doctrine that a party cannot be relieved on the ground of a mistake in matter of law."

linquent. I remark, to avoid misconstruction, that it is of universal application in criminal cases. In civil matters, it ought not to be used to effectuate a wrong. That is to say, it cannot be a sufficient response to the claim of an injured person, that he has been injured by his own mistake of the law, when the respondent, against conscience, is the holder of an advantage resulting from that mistake. The meaning, then, of this maxim is this: no man can shelter himself from the punishment due to crime, or excuse a wrong done to, or a right withheld from another, under a plea of ignorance of the law. The maxim contemplates the punishment of crime, the redress of wrong, and the protection of rights. Is it not unreasonable so to construe it as to apply it to one who has not only done no wrong and withheld no right, but is himself the injured party, as in this case? The plaintiff has violated no law, withheld no right from the defendants, and in no particular wronged them; but on the contrary, he has been injured to the extent of the money which they unrighteously withhold from him. In this view of it, too, the public policy of the maxim is sustained. I cannot see that its utility is lessened by this limitation of its application. In the language of Sir W. D. Evans, "The effect of the doctrine is carried sufficiently far for the purposes of public utility, by holding that no man shall exempt himself from a duty, or shelter himself from the consequences of infringing a prohibition imposed by law, or acquire an advantage in opposition to the legal rights and interests of another, by pretending error or ignorance of the law," 2 Poth. Obl. App. 297.

The distinction between ignorance and mistake of the law is recognized by Lord ROSLYN in Fletcher v. Talbot, 5 Ves. 14; by Lord MANNERS, in Leonard v. Leonard, 2 Ball. & B. 180, 183; by the Court of Appeals of South Carolina, in Lawrence v. Beaubien, 2 Bai. 623; and in the Executors of Hopkins v. Mazyck et al, 1 Hill Ch. 251.

In England the authorities are pretty nearly *in equilibrio,* yet I must think that the preponderance, taking the cases at law and in equity together, is on the side of the principle which I am laboring to establish. This action for money had and received is an equitable remedy, and lies generally where a bill will lie; decisions, therefore, in chancery which recognize the principle may be justly held to sustain it. The first case, then, in order of time, is that of Lansdowne v. Lansdowne, reported in Moseley 364, decided by Lord Chancellor KING. That case was this: The second of four brothers died seised of land, and the eldest entered upon it. But the youngest also claimed it. They agreed to leave the question of inheritance to one Hughes, a schoolmaster, who determined against the eldest brother, on the ground that lands could not ascend. Whereupon, the eldest agreed to divide the estate, and deeds were executed accordingly. Lord KING decreed that they should be delivered up and canceled, as having been obtained by mistake. There is no doubt whatever, but the mistake was one of law as to the legal rights of the elder brother. It is a case in point. It is true that it has been greatly

criticized. Moseley, the reporter, has been charged with inaccuracy, and was very much in disfavor with Lord MANSFIELD. Indeed, it is said that his lordship did, on one occasion, order his reports not to be read before him. Yet there stands the case, and if supported by nothing else, it is sustained by its reasonableness. Judge MARSHALL, in referring to it, says that it cannot be wholly disregarded.

The case of Bize v. Dickason was decided by Lord MANSFIELD in the Court of King's Bench. The judgment of the court was delivered as follows: "The rule has always been that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So, where a man has paid a debt which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet, the money being paid, it will not oblige the payee to refund it; but where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again in this kind of action," 1 T. R. 285.

This authority is incontrovertible, and has not been controverted. The case made shows a mistake of law. The mistake spoken of by Lord MANSFIELD could not have been a mistake of facts, because the case exhibits no mistake of facts, but does exhibit a mistake of the law.

The principle was sustained by a decree in Bingham v. Bingham, 1 Ves. 126. There the bill was filed on the ground of a mistake in law. The master of the rolls said, "Though no fraud appeared, and the defendant apprehended he had a right, yet it was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right." See the note to this case in Belt's Supplement 79, which shows the mistake to have been one of law. Also recognized in Turner v. Turner, 2 Ch. R. 154; in Leonard v. Leonard, 2 Ball & B. 171, by Lord MANNERS; by Lord THURLOW, in Jones v. Morgan, 1 Bro. C. C. 219, and by Lord ELDON, in Stockly v. Stockly, 1 Ves. & Bea. 23, 31, and in Anchor v. The Bank of England, Doug. 638.

To these authorities may be added the *dicta* of Lord Ch. J. DE GREY, in Farmer v. Arundel, 2 Black. R. 824, who declared, "That where money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie." Of Lord KENYON, in the case of Chatfield and Paxton, see Chitty on Bills 102, and of CHAMBRE, J., in Brisbane v. Dacres, 5 Taunt. 157. This judge, arguing the point with great strength, says, "It seems to me a most dangerous doctrine, that a man getting possession of money to any extent, in consequence of another party's ignorance of the law, cannot be called on to repay it." He illustrates by putting the very case made in principle in this record. "Suppose," says he, "an

administrator pays money *per capita,* in misapplication of the effects of the intestate, shall it be said that he cannot recover it back?"

Opposed to this weight of authority in England, stand the two cases of Bilbie v. Lumley, 2 East 469, and Brisbane v. Dacres, 5 Taunt. 157,—in the latter case CHAMBRE, J., dissenting,—and the *obiter* opinion of BULLER, J.

It is worthy of remark that Lord ELLENBROUGH, who presided in Bilbie v. Lumley, afterward in Perrott v. Perrott, 14 East 423, holds language irreconcilable with his opinion in that case. In the latter case, he is reported to say, "Mrs. Territ either mistook the contents of her will, which would be a mistake in fact, or its legal operation, which would be a mistake in law, and in either case we think the mistake annulled the cancellation." Thus it is manifest that our judgment in this case is not without precedent in the English books.

The authority of Bilbie v. Lumley has been followed in this country by Chancelor KENT, Shotwell v. Mundy, 1 Johns. Ch. 512; Lyon v. Richmond, 2 Johns. Ch. 51; 6 Johns. Ch. 169, 170, and by the supreme court in Hunt v. Rousmanier, 1 Pet. 1. In the same case, however, in 8 Wheat. 215, Ch. J. MARSHALL says: "Although we do not find the naked principle, that relief may be granted on account of ignorance of the law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." The case in 1 Peters 1, was decided, however, upon other principles than that one now under discussion. The same may be said of the cases in Johnson's Chancery Reports, above referred to. Yet it may not be denied but that the courts there recognize the rule as settled in Bilbie v. Lumley. It may be questioned whether the recognition of that authority by the supreme court is worth as much as the opinion of Ch. J. MARSHALL, intimated so plainly in the above extract, as to the rule in chancery. The leaning of Mr. J. Story, in his Commentaries on Equity, is the same way; and yet he says, "It has been laid down as unquestionable doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake," 1 Story Eq., § 121.

Why it is that a party may be relieved from the consequences of a mistake of the law, where he gives up his property, ***under the name of a compromise,*** and not under other circumstances, it is difficult to see.

Mistake of the law has been held without relief in Illinois (3 Gilman 162), in Tennessee (8 Yerger 298), in New Jersey (1 Green's Ch. Rep. 145), and in Alabama (9 Ala. 662), and it may be elsewhere, beyond my time for ascertainment.

The contrary was expressly ruled by the Court of Appeals in South Carolina, in Lowndes v. Chisholm (2 McCord's Ch. R. 455), in 1827. This was followed by the great case before the same court

in 1832, of Lawrence v. Beaubien. I call it *great* because of the affluence of learning displayed in the argument by Messrs. Holmes and King on one side, and Pettigru and Bailey on the other, and because of the perspicuous condensation and ability of the opinion of Mr. J. Johnson. The doctrine, in all its bearings, is there discussed with extraordinary power, and the court unanimously decided that, "A mistake of law is a ground of relief from the obligations of a contract by which one party acquired nothing and the other neither parted with any right, nor suffered any loss, and which, *ex aequo et bono,* ought not to be binding; and that it makes no difference that the parties were fully and correctly informed of the facts, and the mistake as to the law was reciprocal, but there must be evidence of a palpable *mistake,* and not mere *ignorance* of the law." The case of Lawrence v. Beaubien was reviewed in 1833, by the court of appeals, in Executors of Hopkins v. Mazyck and others, and its doctrines affirmed. 1 Hill's Ch. R. 242. So that in South Carolina the question is definitely settled. So, also, in Massachusetts, in the same way. See May v. Coffin, 4 Mass. 342. Warder v. Tucker, 7 Mass. 452; Freeman v. Boynton, 7 Mass. 488. See, also, Haven v. Foster, 9 Pick. 112.

The writers on the civil law are divided as to the question whether money paid under a mistake of law is liable to repetition. Vinnius and D'Aguesseau hold the affirmative; so Sir W. D. Evans. The argument of the great French chancellor, D'Aguesseau, is, to my mind, unanswerable (which see in 2 Evans' Pothier, Appendix 308). Pothier and Heineccius maintain the negative; and it is said that the text of the Roman law is with them. See Rogers v. Atkinson, 1 Kelly, 25, 26; Collier v. Lanier, 1 Kelly 238.

Let the judgment of the court below be reversed.[1]

[1] In City of Covington v. Powell, 2 Met. (Ky.) 226, 228 (1859), the court says: "It may be now regarded as well settled in this state that when money has been paid through a clear and palpable mistake of law or fact, essentially affecting the rights of the parties, which, in law, honor, or conscience, was not due and payable, and which ought not to be retained by the party to whom it was paid, it may be recovered back. (4 Dana 309; 3 B. Mon. 513; 1 Met. 153.)"

In Northrup's Executors v. Graves, 19 Conn. 548, 554 (1849), the court says: "We mean distinctly to assert, that, when money is paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, in an action of *indebitatus assumpsit,* whether such mistake be one of fact or of law."

See the admirable critical summary of the question of the recovery of money paid under mistake of law, in Woodward's Quasi-Contracts, §§ 35-44. For a review of the English, French and German doctrines, see Stadden's "Error of Law," 7 Col. L. Rev. 476, and comment thereon in 21 Har. L. Rev. 225. The prevailing common-law rule, in the United States, has been modified by statute in California, Montana, North Dakota, South Dakota, Oklahoma and Georgia.

ii. *Void Ordinances.*

TOWN COUNCIL OF CAHABA v. BURNETT.

34 Ala. 400.—1859.

Action to recover back money paid for a license under an ordinance which was thereafter held to be void.

A. J. Walker, C. J.—It is the law of this state that where money has been *voluntarily* paid, through mistake or ignorance of law, with a full knowledge of the facts, and without fraud or imposition, it cannot be reclaimed, either at law or in equity. While we are aware that this proposition is too broad to harmonize with all the decisions, yet it is supported by the great preponderance of adjudged cases, both in England and America, and by what we conceive to be a sound policy, and has been too often recognized in our jurisprudence to be now denied. For these reasons, and because the subject has been recently examined with care in this court, we decline to enter upon a discussion of the subject. Gwynn & Wife v. Hamilton, 29 Ala. 233; Rutherford v. McIvor, 21 Ala. 756; Knox v. Abercrombie, 11 Ala. 997.

That the payment of the money sought to be regained by this suit was made with a full knowledge of all the facts, in the absence of fraud or imposition, and on account of a mistake or ignorance of the law, is clear, and is not controverted. The proposition with which this opinion commences therefore leaves the plaintiff no ground for his demand, if the payment was voluntary; and the fate of the case hangs upon the single question whether, in the eye of the law, the payment was voluntary or compulsory.

Without being thereto directly called or requested, the plaintiff went to the proper officer of the town council, and paid to him the sum required by the ordinance to procure license to retail liquor in the town for the remainder of the year. The money was accepted, the license issued, and the defendant accordingly retailed liquor within the town. The ordinance fixing the price of the license has since been declared void. Other ordinances prescribed a liability to a fine of $50 for every day upon which any person might retail liquor without license, and to imprisonment for a time not exceeding three days, if the fine was not paid. The payment of the price of the license was purely voluntary, unless the prospect of proceedings whereby he would be subjected to fine and imprisonment (if he failed to pay it) amounted to compulsion. There was no fraud, no confidential relation, no personal exaction. The ordinances do not appear to have been adopted otherwise than in the fullest confidence of their validity, and it is most probable that the plaintiff's proposal to pay the prescribed sum was under a conviction of legal duty. It does not affirmatively appear that the plaintiff was influenced by an apprehension of proceedings against him; but, if the presumption

that he was can be indulged, it does not afford a sufficient predicate for the conclusion that he acted under what the law deems compulsion. That money has been paid under the apprehension of judicial proceedings, is no reason why there should be a reclamation.

If the influence of the mere apprehension of judicial proceedings is legal compulsion—if, when a party, having the alternative to pay or submit to a judicial investigation, elects the former, he can be said to act under a legal duress, then the distrust of the adequacy of the courts to protect and maintain the right is justified, and it is acknowledged that the perils of justice and right in the judicial tribunals are so great as to deprive one of his free volition, and shield him from responsibility. The law does not recognize its amenability to such a reproach. In consequence of the imperfection incident to all that is human, wrong may sometimes prevail in the purest and wisest judicial tribunals; yet, in theory, there is in our law a security for every right, and a redress for every wrong; and the practical operation of the law corresponds, in the main, with its profession. No one can be heard to say that he had the right and the law with him, but he feared his adversary would carry him into court, and that he would be unlawfully fined and imprisoned; and that being thereby deprived of his free will, he yielded to the wrong, and the courts must assist him to a reclamation.

Again: Another reason why a recovery should not be had in such a case is, that it would enable one, by paying a claim about to be asserted by suit, to fix his own time, within the statute of limitations, for the litigation. He might prefer to pay off the claim, and take the chance of his adversary's losing his testimony within the period of limitation from the time of payment; thus affording him an opportunity to regain the sum paid, when peradventure it might be made to appear, under the facts then extant, that the payment was not required by the law.

Furthermore, if the principles contended for were allowed, it would injuriously affect the party to whom the payment was made. Regarding the money as his own, he might be induced to adopt a style of living, or to dispense benefactions not justified by his fortune. So far has this been carried in Pennsylvania, that a recovery of taxes illegally assessed was denied, because the borough which had received the payment had expended it in improvements. Borough of Allentown v. Saeger, 20 Penn. State R. (9 Har.) 421. While we will not now endorse that case in its full extent, it illustrates the view which the courts take of the injustice involved in such suits; and it is the more appropriate here, because it was proved that most, if not all the money, had been expended by the corporation; and, it may be, in improvements, the benefits of which are shared by the plaintiff himself. * * *

If money be extorted as a condition upon which an officer will grant a license, the clearance of a vessel, or the like, when the party is legally entitled to it, the payment is involuntary. Morgan v. Parmer, 2 B. & C. 733; Ripley v. Gelston, 9 Johns 201, and Elliott v. Swart-

wout, 10 Pet. 137. The plaintiff cannot invoke that principle, because if it be conceded that he was entitled to have license issued from the corporation, the money was not extorted from him as the only agency by which he could obtain the license, but of his own volition he went forward and proposed the payment. He who received the payment was merely passive: he made no demand, no exaction. The distinction is between the cases where a party, acting from his own volition, makes a payment, upon the suggestion of his own mind that it is legal, to an officer who accepts it because he also deems it legal; and where a party demands that which is due him from the officer, and the latter exacts the payment as the only condition upon which he can obtain that which is legally due from that officer. In the former case, the payment is voluntary; in the latter, involuntary. This distinction is taken and sustained in several of the cases above cited. Robinson v. City of Charleston, 2 Richardson 317; Sprague v. Birdsall, 2 Cow. 419; Maxwell v. Griswold, 10 How. 256; Elliott v. Swartwout, 10 Peters 137; Atlee v. Backhouse, 3 M. & W. 632; Amesbury Woolen & Cotton Man. Co. v. Inhabitants of Amesbury, 17 Mass. 461.

Upon the last point above stated in this opinion my brethren express no opinion. They think there is no necessity for deciding that point, and that the decision of the other points is conclusive as to whether the payment was voluntary. I think differently. I understand the plaintiff to plant himself upon the proposition that the payment was involuntary for two reasons: First, because of the liability to fine and imprisonment in the event of his not paying; and, second, because the payment was made to procure a license to which he was entitled without such payment. In my opinion, we are not authorized to affirm that there was error in the overruling of the demurrer to evidence, unless we can decide both these propositions against the plaintiff.

The court is unanimous in the conclusion, that, upon the facts, the plaintiff had no right of action whatever, and the court erred in adjudging the demurrer to evidence in his favor.[1]

[1] Accord, Cook v. Boston, 9 Allen (Mass.) 393 (1864), the court saying: "The plaintiffs here voluntarily sought and obtained a privilege, and enjoyed it during the term of their license. They elected to take it, knowing that the city claimed therefor the sum they paid, as the just and proper sum to be paid therefor. They could have been subjected to no penalties for breach of the by-laws of the city in the use of their wagons, without a full opportunity to contest their legality. Their case is not one where the money can be recovered back on the ground of duress;" and adding as to the effect of protest that "the fact that the money was paid to the defendants under protest does not affect the case, where the payment was made under circumstances like the present." Accord, Camden v. Green, 54 N. J. L. 591 (1892); and see the opinions in Baldwin v. Village of Chesaning, 154 N. W. 84 (Mich. 1915).

Upon the question as to whether a license fee is a tax the court in Mays v. Cincinnati, 1 Oh. St. 268, 273 (1853), says: "Was the sum demanded by the ordinance for the license to trade a tax? The sum required is limited only by the discretion of the council, but whatever it may be, it goes into the city treasury and constitutes a part of its general fund. The term has been correctly defined to be one of general import, including almost every species

MAYOR AND COUNCIL OF WILMINGTON v. WICKS.

2 MARV. (DEL.) 297.—1896.

THIS was an action brought to recover back $10, amount paid for license under what was termed the milk ordinance, which provided:

Section 3. Each and every person or persons desiring to engage in the business of selling milk or cream in the City of Wilmington shall apply to the board of health for a license.

Section 5. Provided that any person engaged in said business who should not take out such a license, should, upon conviction before the municipal court, forfeit and pay a sum not exceeding $10 for the first offense, and for the second offense, $25, and should forfeit his license.

Section 11. Provided that the milk inspector shall prosecute before the municipal court all offenders against this ordinance.

At the trial it was admitted that the money paid has passed into the city treasury and is now in possession of the defendant; and that this ordinance, subsequent to the payment by the plaintiff of the fee for his license, was declared void.

The plaintiff testified that he was engaged in the milk business previous to the 18th day of April, 1895, the date of the passage of the milk ordinance; that during the month of May, of 1895, he received notice from the city with a copy of the ordinance, and a few days after that the following notice appeared in the newspapers:

"All persons engaged in the sale of milk are hereby notified to take out a license, as provided in the ordinance, on or before Saturday next, June 8. After that time any person engaged in the sale of milk who has not complied with the law will be prosecuted. By order of the board of health. W. C. R. COLQUHOUN,
Secretary."

He said that in preference to being fined and having to pay for the license, he considered it best to pay the license, and went to the office of the board of health and paid it to Mr. Colquhoun. "If that is the law I propose to be a law-abiding citizen, and if this is not the law expect to have my money back." He said, "Well, I will tell you straight; I will be damned if you get your money back." He also said, "If I sold a half-pint of milk, I had to pay that license or be arrested." The plaintiff thereupon paid the fee and got the license.

of imposition on persons or property for supplying the public treasury, as tolls, tribute, subsidy, excise, impost or customs. In a more limited sense, it is the sum laid for the same purpose upon polls, lands, houses, personal property, professions and occupations. Whether regarded in the larger or more limited sense, the sum here exacted is clearly included. A license may include a tax or it may not. If the exaction goes no further than to cover the necessary expenses of issuing it, it does not; but if it is made a means of supplying money for the public treasury, we agree with the court in State v. Roberts, 11 Gill & Johns. 506, that it 'is a tax, is too palpable for discussion.'"

Lore, C. J. (charging the jury).—This is an action brought to recover back money that was paid by Wicks, the plaintiff, to the City of Wilmington for a license to sell milk. Wicks claims to have paid the money under protest and involuntarily. Upon an examination of the case, as presented to the court and jury, the court think that it is a case of voluntary payment, and not of involuntary payment in contemplation of law. We therefore direct you to find a verdict in favor of the mayor and council of Wilmington, defendant below, appellant.

CITY OF HELENA v. DWYER et al.

65 Ark. 155.—1898.

Action by Dwyer Bros. against the city of Helena. From a judgment for plaintiffs, defendant appeals. Reversed.

The appellees, Dwyer Bros., brought suit in the Phillips circuit court against the appellant to recover certain sums of money which were paid by them at various times from January, 1893, to February 1, 1895, as a license for keeping a meat market in the city of Helena, amounting in the aggregate to the sum of $109. The complaint, among other things, alleges that these various amounts were paid to the said defendant (appellant) against their will, illegally, and under protest and duress of law, as a license to them for keeping a meat market in said city; that the amounts were collected at different times by the collector of said city, who was also the chief of police thereof, under an ordinance passed by said city; that they were compelled to pay said sums of money in installments, from time to time, whenever called upon by said city officers, to prevent being arrested and subjected to the payment of a fine upon their failure to pay the same, there being a penalty attached to said ordinance, which subjected one to the payment of a fine, and arrest, who failed to pay the same when called upon by the proper officers of said city; that the ordinance was unconstitutional and contrary to the laws of the state; and that the city had no right to collect the same. The appellant answered, denying the illegality of the ordinance, and charged that the various sums paid to appellant by appellees were paid freely and voluntarily, without question, fraud, mistake, threats of arrest, or duress of any kind whatsoever, and were also paid prior to the repeal of ordinance referred to. The section of the ordinance prescribing the penalty for violation of this ordinance is as follows: "Be it ordained, that any violation of this ordinance shall subject the offender to a fine of not more than $25 for each offense, to be adjudged by the mayor or jury trying the case." This is the only part of the ordinance necessary to set out, as the appellant does not contend here that the ordinance was valid, but only contends that the payments by appellees were voluntary. The court

found the facts to be as follows: "That while the ordinance provided a failure to pay the license rendered the offender liable to a criminal prosecution and a penalty, the amounts sued for were paid to enable plaintiffs to carry on their legitimate business, and not to be adjudged criminals; that the amounts were paid to F. D. Clancey as city collector, and not as chief of police; that he, as such collector, had no authority to make arrests; that the amounts were paid without objection or protest, but for the reason that their failure would subject them to arrest and prosecution for a failure to pay; that appellees were never threatened with arrest, or arrested, at the time the payments were made." Appellant asked the court to declare the law as follows: "The payment by the plaintiffs must have been made under compulsion, under protest, and to prevent the immediate arrest and detention of his person, and not voluntarily made,"—which the court refused, but declared the law as follows: "That the payments made by plaintiffs were made under a legal duress and compulsion, and, in law, not voluntarily; that an ordinance which requires the payment of an amount of money before going into business, when paid becomes a payment under duress of law, and the party paying is entitled to recover the same back by suit at law."

WOOD, J.—Judge Dillon says: "The coercion or duress which will render a payment of taxes involuntary must in general consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means, or reasonable means, of immediate relief, except by making payment." 2 Dill. Mun. Corp. § 943. Again he says: "Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot, without statutory aid—there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law,—be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine, could not have been legally demanded and enforced." Id. § 944. Judge Cooley enumerates, as one of the conditions upon which illegal and void taxes paid to a municipal corporation may be recovered, the following: "It must have been paid under compulsion, or the legal equivalent." Cooley, Tax'n, p. 805. And he defines a "compulsory payment" as follows: "A payment made to relieve the person from arrest, * * * or to prevent a seizure, when it is threatened." Id. p. 84. The principles here announced were approved by this court in Town of Magnolia v. Sharman, 46 Ark. 358. It will be seen, by applying these principles to the facts as found by the court in the present case, that the court erred in its declaration of law, and in refusing to declare the law as asked by the appellant. We are of the opinion that the payments made by appellees, under the facts stated, cannot be construed otherwise than as voluntary payments. See First Nat.

90 Ind. 495, decided in 1883, wherein, under the provisions of section 5 of an act of the legislature of 1881 (section 2651, Rev. St. 1881), which were, in effect, the same as are those in section 8654, *supra,* it was held that no part of the surplus dog fund belonged to the city school corporation, but that such fund belonged to, and should be distributed wholly to, the school township. Counsel for appellant do not insist but what the construction given to the statute in the Taggart appeal was correct, and virtually concede that the decision in the case of School City of South Bend v. Jaquith, *supra,* was properly overruled. But their principal contention in support of this appeal seemingly is that our decision overruling the case must not be held to be retrospective, and thereby invade what they term the vested rights of the appellant to the money in controversy.

JORDAN, J.—* * * * Shall we confine the change made in the interpretation of the law by the Taggart Case so as to operate prospectively only, and thereby not affect appellant in its claim to the entire surplus dog fund distributed to and received by it prior to March 21, 1895, or shall the new construction of the statute be held to be binding on it as to the money in dispute? The decisions of a court of last resort, the authorities assert, are not the law, but are only the evidence or exposition of what the court construes the law to be; and in overruling a former decision by a subsequent one the court does not declare the one overruled to be bad law, but that it never was the law, and the court was therefore simply mistaken in regard to the law in its former decision. The first decision, upon the point on which it is overruled, is wholly obliterated, and the law as therein construed or declared must be considered as though it never existed, and that the law always has been as expounded by the last decision. Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358; Ram, Judgm. 47. This rule, however, is subject to the well-settled doctrine that courts will not so apply a change made in the construction of the law as it was held to be in the overruled case, as to invade what is considered vested rights; or, in other words, while, as a general rule, the law as expounded by the last decision operates both prospectively and retrospectively, still courts are required to and do confine it in its operation so as not to impair vested rights, such as property rights, or those resting on contracts, express or implied. Haskett v. Maxey, *supra;* Stephenson v. Boody, 139 Ind. 60, 38 N. E. 331. The true rule affirmed by the authorities, and the prevailing one, is to give a change of judicial construction in regard to a statute the same effect in its operation, so as not to disturb vested rights, as would be given to a legislative amendment; that is, apply the change in the interpretation of the law so as to operate prospectively, and not retroactively. Douglass v. Pike Co., 101 U. S. 677. But the rights which the law protects must be real. They must be rights of property, or those founded on contract, express or implied. Suth. St. Const., § 164, states the rule in this respect as follows: "When a right has arisen on a contract or a

transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right, which stands independently of the statute. * * * This is a principle of general jurisprudence; but a right, to be within its protection must be a vested right. It must be something more than a mere expectation based upon anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another."

But can the appellant in any sense, under the facts and circumstances in this case, be said to have acquired a vested right to the surplus dog fund involved in this action, so as to bring it within the protection of the rule to which we have referred, and thereby be entitled to deny appellee's right of recovery? It is evident that the money received by it under the construction placed on the law by a former decision of this court was not embraced in any contract or property rights in the legal acceptation of those terms. The fund out of which the money in dispute was distributed to appellant was collected and accrued under legislative authority, and, in a legal sense, was the property of the state; and the surplus certainly was subject to be disposed of or applied by legislative authority to any public purpose not inconsistent with the constitution. Appellant is a public corporation; the creature of the legislature; or, in other words, but an instrument in the hands of the latter to carry out its will in regard to the common-school system of the state, and therefore at all times, in respect to the control or disposition of its funds, it is subject to the will of the law-making power, provided, of course, that such will must not be so exercised as to disturb existing contract rights. The rule is well settled that the control of the state over a public corporation is subject to no such limitations as operate in favor of corporations of a private character; consequently the law makes a distinction between the rights of the individual or private corporations and those of a public corporation.

It must follow, as a necessary result of these principles, which are controlling over appellant, that it, under the circumstances, is not in a position to raise any question in respect to vested rights which it claims were invaded by the change in judicial construction of the statute providing for the disposition of the surplus dog fund. Taggart v. State, *supra;* Endlich Interp. St., § 284; Wade, Retro. Laws, §§ 21, 22; People v. Morris, 13 Wend. 325; Beach, Pub. Corp., §§ 720-722. Appellant, therefore, having received the money through a judicial misinterpretation of the law, cannot be successfully heard to deny appellee's right thereto, which existed in the first instance, under the proper construction of the statute whereby the legislature had declared its will in respect to the dispo-

sition of the surplus dog fund. The complaint is sufficient, and the judgment is therefore affirmed.[1]

---

iv. *Payment by Public Officers.*

FREDERICK v. DOUGLAS COUNTY ET AL.

96 Wis. 411.—1897.

THIS action was commenced November 16, 1895, by the plaintiff, for himself and all other taxpayers of said county, to restrain the county and its officers from paying to the defendant H. H. Grace or issuing warrants to him for the payment of anything whatever for or on account of his services as attorney, rendered or to be rendered to the county, and to compel the said Grace to pay back to the county $2,012, which had previously been paid to him.

WINSLOW, J.—* * * * All the members of this court agree that Mr. Grace cannot be compelled to pay back the money he has actually received for the legal services rendered by him to the county prior to the commencement of this action, but the remaining members of the court do not agree with the Chief Justice as to the legal grounds upon which such decision should be based, and I have been requested by my colleagues to present, as best I may, their views upon that subject.

In our judgment, it would be dangerous to hold that because Mr. Grace had actually rendered services, and the county had voluntarily paid for the same with knowledge of the facts, such money so paid could not be recovered. There are many cases which hold that, as between man and man, money paid voluntarily, with knowledge of all the facts, and without fraud or duress, cannot be recovered merely on account of ignorance or mistake of the law. A number of these cases are cited in the opinion of the Chief Justice, and it is not my province to combat this principle. This is simply the doctrine of voluntary payment. It is frequently applied to the payment of illegal taxes. It is founded upon the general principle that a man may do what he will with his own. He may give it away, or buy his peace; and, if he does so with knowledge of the facts, he is generally remediless. But public officials do not stand upon the same basis. They are not dealing with their own. They are trustees for the taxpayers, and, in dealing with public funds, they are dealing with trust funds. All who deal with them know also that the public officials are acting in this trust capacity. To hold that, when public officers have paid out money in pursuance of an illegal and unwarranted contract, such moneys cannot be recovered in a proper action brought upon behalf of the public, merely because the payment has been voluntarily made for services actually rendered,

[1]See also Harris v. Jex, 55 N. Y. 421 (1874); Troy v. Bland, 58 Ala. 197 (1877); Highway Commissioners v. Bloomington, 253 Ill. 164 (1912).

would be to introduce a vicious principle into municipal law, and a principle which would necessarily sweep away many of the safeguards now surrounding the administration of public affairs. Were this, in fact, the law, it can readily be seen that public officials could at all times, with a little ingenuity, subvert and nullify that wholesome principle of law which prohibits their spending the public funds for illegal purposes. All that would be necessary to be done would be to make the contract, have the labor performed, pay out the money, and the public would be remediless. We cannot approve of such a doctrine. The rules of law concerning ratification and estoppel, as applied to the illegal or unauthorized acts of public officials, are simple and well understood. A municipal corporation may undoubtedly ratify an unauthorized contract made by its agents, which is within the general scope of its corporate powers; but it is equally certain that it cannot ratify such unauthorized acts of its agents as are beyond its scope, or such contracts as it had no power to make originally. Trester v. City of Sheboygan, 87 Wis. 496, 58 N. W. 747; Koch v. City of Milwaukee, 89 Wis. 220, 62 N. W. 918. Ratification and estoppel are of very much the same nature, and the principles which apply to ratification substantially apply also to estoppel. As said by Mr. Dillon in the passage quoted by the Chief Justice: "The general doctrine is undoubted that there is ordinarily no estoppel in respect to acts which are in violation of the constitution or of an act of the legislature, or which are obviously, and in the strict and proper sense of the term, ultra vires. * * * We mean by it, as here used, the want of legislative power, under any circumstances or conditions, to do the particular act in question." This passage, we believe, expresses the law with clearness. This court decides in the present case that "the county board had no authority to employ Mr. Grace to take charge of and conduct the tax litigation mentioned." They had no authority under any circumstances then existing, because they had a district attorney qualified and acting. Therefore the employment of Mr. Grace was to the full extent an act beyond their power, and hence incapable of ratification. It is not difficult to find cases holding to the full extent the doctrine that where public officers have made an illegal appropriation of public money, and the money has been paid, it may be recovered in a proper action brought either by the corporation or by taxpayers on behalf of the public. Such actions have generally been actions in equity, brought to restrain the further misappropriation of funds, and, as an incident of full relief, to recover back moneys already paid; and it may be stated as a uniform rule that in such cases such moneys may be recovered back, especially where there is any ground to charge fraud, corruption, or concealment in the transaction. A case in point is that of Russell v. Tate, 52 Ark. 541, 13 S. W. 130, in which an illegal appropriation of town funds was made to aid in completing a county court house. A part of the appropriation was paid over immediately. As said in the opinion:

"The appropriaton was made, and the warrant drawn, and the money paid by the treasurer, before an attorney could have comprehended the situation, and written the caption of a complaint." And the court held that the amount already paid could be recovered, as well as that there should be an injunction against any further payment, thus doing complete justice in one action. Other cases in which voluntary payments by municipal officials have been recovered back may be cited, as follows: Demarest v. Inhabitants, 40 N. J. Law, 604; Weeks v. Texarkana, 50 Ark. 81, 6 S. W. 504; Tacoma v. Lillis, 4 Wash. 797, 31 Pac. 321. The principle is also recognized in Willard v. Comstock, 58 Wis. 565, 17 N. W. 401. But while we believe it to be salutary and a correct principle of law to hold that moneys paid out by municipal officials in violation of law may be recovered from the recipient in an action seasonably brought, especially where the transaction is marked by haste, fraud, collusion, or concealment, we believe there are cases in which the circumstances are such that a court of equity ought not to decree the return of money merely because the appropriation thereof was unauthorized, and such a case we believe to be before us now.

The evidence and the findings show that Mr. Grace's employment began in January, 1895, and it was a matter of public notoriety, and the plaintiff himself and presumably all taxpayers who kept track of the public proceedings knew that he was employed as early as the spring of 1895; that he performed large and valuable services, for which he was from time to time paid; and that not only he, but the county board, acted in entire good faith in the matter. There was no haste and no evidence of collusion or concealment. Mr. Grace's services ran through a number of months, and he undoubtedly has fully earned all the money which has been paid him. During all this time the plaintiff and his fellow taxpayers remained silent, and allowed the services to be rendered and the money to be paid. They took no action until the latter part of November, 1895. Then they came into a court of equity, and asked for the stoppage of all payments in the future, and to this they are undoubtedly entitled. But he who comes into a court of equity must do equity. Could it, under any view of the circumstances, be said to be equitable to compel Mr. Grace to pay back the money which he received for long and valuable labors, rendered honestly and in good faith, the benefit of which the corporation has received, and concerning which the taxpayers of Superior were, or ought to have been, fully informed during their entire progress? Were a court of equity to make this judgment under the circumstnces, we should regard it as having become an engine of oppression, rather than an instrument of justice. We do not rest this decision entirely upon the ground that the remedy has been lost by laches, or that the county has become estopped, but upon the ground that, under all the circumstances, the plaintiff having invoked the relief of a court of

equity, that court, in granting the relief, will not take away the fruit of honest labor. Mayor, etc., v. Huff, 60 Ga. 221.[1]

---

v. *Payment to an Officer of the Court.*

GILLIG v. GRANT, AS RECEIVER.

23 App. Div. (N. Y.) 596.—1897.

Appeal by the defendant, Hugh J. Grant, as receiver of the St. Nicholas Bank of New York, from a judgment of the Supreme Court in favor of plaintiff, entered in the office of the clerk of the county of New York on the 12th day of October, 1897, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 14th day of October, 1897, denying the defendant's motion for a new trial made upon the minutes.

[1] In United States v. Dempsey, 104 Fed. 197 (1900), where a paymaster of the United States army, by mistake of law overpaid an army officer, the court said (p. 199): "The next question is, the money having been paid over to and received by the defendant by reason of an erroneous construction of the law, can the same be recovered from the defendant by the government in this suit? The paymaster who paid the defendant the above sum of money could go no further in this matter than he was authorized by law. The law limited his powers. He could bind the government only to the extent authorized by law. The government was not bound when he exceeded the authority given him by the federal statutes. The money paid to the defendant was the money of the government, and, as stated above, the government having provided the defendant with suitable quarters free of charge, the paymaster was not authorized to pay him this money. That belonged to the government. Under such circumstances the following decisions maintain the rule that the government may sue for and can recover back this sum of money so paid: McElrath v. United States, 102 U. S. 441, 26 L. Ed. 189; Wisconsin Central R. R. Co. v. United States, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399."

Accord, County of Wayne v. Reynolds, 126 Mich. 231 (1901), overruling Wayne Co. v. Randall, 43 Mich. 137 (1880), and Advertiser Co. v. Detroit, 43 Mich. 116 (1880).

Contra, Village of Morgan Park v. Knopf, 199 Ill. 444, 446 (1902), the court saying: "There was no fraud or mistake of fact, and if there was any mistake it was one of law, and the money having been voluntarily paid under such circumstances, no action would lie to recover it back. This rule, which is well settled as between individuals, has been extended to municipal corporations under similar circumstances. People v. Foster, 133 Ill. 496." Professor Schofield in 1 Ill. L. Rev. 335, referring to this quotation says of the Foster case: "I think I am safe in affirming first, that the court could not on the facts before it decide any such proposition; and secondly, that all of the cases there cited on pp. 509-511, in seeming support of that proposition have been explained away in the courts where they were decided, except possibly Snelson v. The State, 16 Ind. 29." The Foster case was also followed as authority in City of Sullivan v. Whitfield, 109 Ill. App. 120 (1903).

This action was brought to recover money received by the defendant as the proceeds of an execution sale against the George C. Treadwell Company. In January, 1894, the plaintiff brought an action against the company, in which a warrant of attachment was issued to the sheriff of Albany county. On January 9, 1894, a levy was made under this warrant and property set apart for the satisfaction of the plaintiff's claim. The following day a warrant of attachment against the company was issued in an action brought by the defendant, and on January 11, 1894, a levy was made under this warrant, and property set apart for the satisfaction of the defendant's claim. The property attached under the plaintiff's warrant was sold under an execution subsequently issued upon a judgment obtained by him in the action, but proved insufficient to satisfy such judgment. Plaintiff thereupon moved in Albany county to compel the sheriff to sell the property held under the defendant's warrant and apply the proceeds upon the plaintiff's judgment. This motion was denied at Special Term on February 12, 1895, and the order was affirmed by the General Term of the third department in the following March. In January, 1896, the Court of Appeals reversed these orders and granted the motion. In the meantime, in July, 1895, the sheriff, not being stayed from so doing, sold the property held under the defendant's warrant and paid over the proceeds to him. After the decision of the Court of Appeals, a motion was made by the plaintiff to compel the defendant to pay him the amount received from the sheriff. The order entered upon this motion on May 26, 1897, withheld decision as to the plaintiff's right to compel payment, but granted him leave to bring an action to recover the amount. In pursuance of this order the present action was begun.

BARRETT, J.—There are two grounds upon which the judgment in this action should be sustained: *First,* a party's right to follow property upon which he has a lien into the hands of one who has received the property with knowledge of that lien, and who is not a *bona fide* purchaser for value; *second,* the well-recognized exception to the general rule that money paid under a mistake of law cannot be recovered back, namely, where the money is so paid to an officer of the court.

[*After sustaining the judgment upon the first ground, the court proceeds to the second ground.*]

The rule that money paid under a mistake of law cannot ordinarily be recovered back is entirely inapplicable to the present state of facts. This action is not against the sheriff, nor is it brought in the right of the sheriff. It is brought in the plaintiff's own right to recover money, to which he is entitled, from one who has possession of it without right. But even if the money had been paid by the sheriff to Gillig, and the latter, under a misconception of his legal rights under the statute, had paid it over to the receiver, an action to recover it back would lie, for the general rule is subject to the limitation that money paid under a mistake of law to an officer

of the court can be recovered. In *Ex parte James* (9 L. R. [Ch. App. Cas.] 609) Lord Justice JAMES applied this limitation to a trustee in bankruptcy with the observation that the general rule "must not be pressed too far." There a creditor had received money to which he was actually entitled under an execution sale against the bankrupt. He paid this money over to the trustee under the mistaken supposition that the latter was entitled thereto as a matter of law. "I am of opinion," said Lord Justice JAMES, "that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." This decision was followed in *Ex parte Simmonds* (L. R. [16 Q. B.] 308), where Lord ESHER observed that, although the court will in general permit an individual litigant to do a "shabby thing," namely, to keep the money thus acquired, it will not allow its own officer to do this. "It will," said this learned judge, "direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by mistake of law come into the hands of an officer of a court of common law the court would order him to repay it as soon as the mistake was discovered." The doctrine of these cases commends itself to both reason and justice.

In quoting with approval the expressions of these learned English judges, we mean no reflection, even indirectly, upon the receiver or his learned counsel. Indeed, the diligence and tenacity of these gentleman, in the pursuit of property for the benefit of the trust estate represented by them, are commendable. It would, however, be a reproach upon the administration of justice should the court, when the question is squarely before it, hesitate to admonish its officer to desist from further efforts to augment his trust estate at the expense of one who is clearly entitled to the money which that officer holds.

We think, therefore, that the direction below was right and that the judgment appealed from should be affirmed, with costs.

WILLIAMS and PATTERSON, JJ., concurred; VAN BRUNT, P. J., and RUMSEY, J., concurred in result upon second ground stated in opinion.

Judgment affirmed with costs.[1]

[1] In Wilde v. Baker and others, 14 Allen 349 (1867), Baker, who was appointed by the court to be receiver of an insolvent insurance company, levied an assessment upon the members, which plaintiff paid to him. The assessment was afterward held to be invalid by Traders' Ins. Co. v. Stone, 9 Allen 483. The opinion of the court, in full, in the present case is: "CHAPMAN,

vi. *Foreign Law.*

HAVEN v. FOSTER.

9 PICK. (MASS.) 112.—1829.

ASSUMPSIT for money had and received and for money paid.

Andrew Craigie, of Cambridge, Mass., died there intestate, being seised of real estate in Massachusetts and in New York. His heirs at law were his nephews, Andrew Foster, John Foster, and Thomas Foster—all sons of the intestate's deceased sister Mary; and also a niece, Elizabeth Haven (wife of the plaintiff), who was the daughter of intestate's deceased sister Elizabeth. By the statute of New York the land there descended one moiety to the neice, and the other moiety to the nephews. The neice (with her husband) and the nephews sold land in New York, and the purchaser gave to the husband and the three nephews each a bond for one quarter of the purchase money, which bonds were later paid. The husband on discovering that half of the land descended to his wife, brought this action against one of the nephews to recover one-third of the fourth of the purchase money.

MORTON, J.—[After stating some of the facts.] By the statute of distributions of this State these heirs, standing in the same degree of relationship to the intestate, inherited his estate in equal proportions. But by the statute of New York, which carries the doctrine of representation farther than the law of this State, or indeed than the civil or common law, these heirs inherited *per stirpes* and not *per capita*. So that the estate in New York descended, one-half to the wife of the plaintiff, and the other half to the defendant and his two brothers; being one-sixth instead of one-quarter to each. Of the provisions and even existence of this statute, all the heirs were entirely ignorant during the whole of the transactions stated in the case. The plaintiff, having discovered the mistake, now seeks by this action to reclaim of the defendant one-third of the amount received by him on account of the sale of the New York lands, with interest from the time of its receipt. And the question now submitted to our decision is, whether he is entitled to a repetition of the whole or any part of this amount. * * *

The principal objection to the plaintiff's recovery, and the one most relied upon by the defendant's counsel, is, that the payment

J.—The money sought to be recovered in this action was paid to Baker as receiver of an insolvent insurance company, appointed by this court. He and his sureties are liable, unless the money was received under such circumstances that he is liable to repay it to those from whom he received it. But the facts show that the payments were so far voluntary that they cannot be recovered back. Benson v. Monroe, 7 Cush. 125. Judgment for the plaintiff."

to the defendant was made through misapprehension of the law, and therefore that the money cannot be reclaimed.

It is alleged, that to allow the plaintiff to recover in the present action, would be to disregard the common presumption of a knowledge of the law, and to violate the wholesome and necessary maxim *Ignorantia juris quod quisque tenetur scire, neminem excusat.* This objection has been strongly urged by the defendant's counsel, and learnedly and elaborately discussed by the counsel on both sides. It is believed that all of the authorities applicable on the point, from the civil as well as the common law, have been brought before the court.

Whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable perplexity. We do not court the investigation of it, and before attempting its solution, it may be well to ascertain, whether it is necessary to the decision of the case before us.

That a mistake in fact is a ground of repetition, is too clear and too well settled to require argument or authority in its support.

The misapprehension or ignorance of the parties to this suit related to a statute of the State of New York. Is this, in the present question, to be considered fact or law?

The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. 2 Stark. Ev. (Metcalf's ed.) 568; Male v. Roberts, 3 Esp. 163. If a foreign law is unwritten, it may be proved by parol evidence; but if writtten, it must be proved by documentary evidence. Kenny v. Clarkson, 1 Johns. 385; Frith v. Sprague, 14 Mass. 455; Consequa v. Willings, 1 Pet. C. C. 229. The laws of other States in the union are in these respects foreign laws. Raynham v. Canton, 3 Pick. 293.

The courts of this State are not presumed to know the laws of other States or foreign nations, nor can they take judicial cognizance of them till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules and to have the same effect upon all subjects coming within their operation, as the laws of this State.

That the *lex loci rei sitae* must govern the descent of real estate, is a principle of our law with which every one is presumed to be acquainted. But what the *lex loci* is, the court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other

facts? *Juris ignorantia est, cum jus nostrum ignoramus,* and does not extend to foreign laws or the statutes of other States.

We are of opinion, that in relation to the question now before us, the statute of New York is to be considered as a fact the ignorance of which may be ground of repetition. And whether *ignorantia legis* furnishes a similar ground of repetition, either by the civil law, the law of England, or the law of this Commonwealth, it is not necessary for us to determine. The examination, comparison, and reconciliation of all the conflicting *dicta* and authorities on this much discussed question is a labor which we have neither leisure nor inclination to undertake.

In the view which we have taken of this case, it appears that the defendant received a part of the consideration for which the plaintiff's estate was sold; that it was received by mistake; and that this mistake was in a matter of fact. He, therefore, has in his hands money which *ex aequo et bono* he is bound to repay, and there is no principle of law which interposes to prevent the recovery of it out of his hands.

The action for money had and received, which for its equitable properties is ever viewed with favor, is the proper remedy for its repetition. The mode in which the payment was originally secured by bond and mortgage forms no objection to the recovery, inasmuch as the money was in fact paid before the action was commenced. * *

Upon a view of the whole case, it is the opinion of the court, that the plaintiff recover one-third of the whole amount received by the defendant on account of the sale of lands in New York, with interest from the service of the writ.[1]

JOHNSON, J., IN BANK OF CHILLICOTHE (OHIO) v. DODGE.

8 BARB. (N. Y.) 233, 237.—1850.

THE paper negotiated by the defendant to the plaintiffs, upon which the money was advanced, was a time draft issued by the Farmers' Bank of Seneca County [N. Y.], an incorporated banking institution, payable three months after date, to the order of the defendant. The defendant's counsel, upon the trial insisted, and the judge held, that this paper was issued by the bank without authority and was void, and that no recovery could be had upon it. This position was clearly right. The statute forbids such paper to be issued, and it was utterly fraudulent and void. No person, by any act, could give validity or vitality to it as commercial paper, anywhere. And so are all the cases. Leavitt, Receiver, v. Blatchford and Others, 5 Barb. 9. Affirmed in Court of Appeals, 3 Comst. 19. So far

[1] Accord, that mistake of law of another state is mistake of fact, Rosenbaum v. United States Credit System Co., 64 N. J. L. 34 (1899).

the judge ruled as requested by defendant's counsel. But the justice went farther, and instructed the jury that as this paper was made void by an act of our state legislature, of which the plaintiffs, being non-residents of the state, were not bound to take nor supposed to have notice, and as they had in good faith advanced to the defendant the money upon it, they were entitled to recover the money thus advanced. To this part of the charge the defendant's counsel excepted. In this I think the learned justice was entirely correct. The defendant was a resident of this state, and chargeable with a knowledge of all legislative enactments here. The law imputes to him knowledge that this paper, negotiated by him, was utterly void and worthless—no better than mere blank paper. The money was then advanced and paid to him without consideration. It was advanced in Ohio, and the plaintiffs are a corporate body of that state. They are not presumed to have notice of our statutes. The statutes of our state are only brought to the notice of courts and citizens of that state by proof. Had it been shown that the plaintiffs, or the officers of the bank, had actual knowledge of the statute in question, they might, notwithstanding their non-residence, be placed upon the footing of persons mutually dealing in illegal transactions. But there is no such question here. It is not pretended that officers of the bank had any knowledge in fact of our statute. The cause was evidently tried upon the assumption that the money was advanced upon the draft, in good faith, by the plaintiffs, supposing it to be good. No question of that kind was raised at the trial.

The plaintiffs then stand in precisely the same situation as though the money had been paid by them under a mistake as to material facts. Ignorance of the law of a foreign government is ignorance of fact—and in this respect the statute laws of other states of this union are foreign laws. Haven v. Foster, 9 Pick. 112. Norton v. Marden, 3 Shepley 45. And this proceeds upon the principle that foreign laws are matters to be proved, like other facts, before even courts can notice them. It is an elementary principle that money paid under a mistake of material facts, where the party paying derives no benefit from it, may be recovered back.

New trial denied.

2. CONSTRAINT.

a. Constraint by Fault of Defendant.

i. *In General.*

HOGG v. LONGSTRETH.

97 Pa. St. 255.—1881.

This was an action of assumpsit by William Hogg, Jr., against John Longstreth, to recover the amount of certain taxes paid by the plaintiff on premises of which the plaintiff was mortgagee and the defendant was terre-tenant.

Mr. Justice Trunkey.—Henry Myers gave to the plaintiff three mortgages, dated May 31, 1872, each being on a separate lot in Philadelphia. Subsequently Myers conveyed the lots to Kaign, Kaign conveyed to Taylor, and Taylor, by deed dated February 6, 1874, conveyed to Longstreth, the defendant; each conveyance being subject to said mortgages. In 1879 a *scire facias* was issued on each mortgage, against Myers with notice to Longstreth, as terre-tenant, and the judgments thereon aggregated nearly $6,000. Hogg, the mortgagee, purchased the lots at sheriff's sale, on his judgments. During the five years that Longstreth owned the lots, he neglected to pay the taxes. Judgment had been obtained for the taxes of the first three years. After his purchase at sheriff's sale, the mortgagee paid that judgment, and also the taxes for the remaining two years, the proceeds of sale having been insufficient to cover them, and he claims to recover the amount of said judgment and taxes in this suit.

There is no evidence that the defendant agreed to pay the mortgage debt. Hence he was not personally liable therefor, and was under no obligation to the plaintiff, arising out of a contract. As against all the world, except the mortgagee, he held the lots by absolute title, and he could divest the mortgagee's estate by paying the debt. The mortgagee was liable to be taxed for money at interest secured by the mortgages; the defendant, holding title under the mortgagor, was liable for the taxes on the land. Being in possession, he was not only legally liable, but had no equity for the attempt to impose payment of the taxes on another person. By force of law the taxes were a personal charge against the defendant, as well as a lien on the real estate. This lien was not only entitled to preference over other liens, but would not be discharged by a judicial sale on any other lien, unless the proceeds were sufficient to pay it. Therefore, the plaintiff had no alternative but to pay the taxes owing by the defendant, or lose the land. Had the taxes been prosecuted to collection before the foreclosure of the mortgage, the plaintiff must have paid them, or have lost his security. A mortgagee in possession,

holding a living pledge, may pay the taxes on the land, and treat the sum so paid as part of his debt, which he is entitled to receive out of the profits. When the mortgagor is in possession, and neglects to pay taxes which are a lien on the land, the mortgagee may pay them not only in reliance on the personal liability of the owner, but in reliance that the land is liable, and the lien will be deemed as transferred by the state to him in favor of the mortgage debt; Kortright v. Cady, 23 Barb. 490. Where a mortgagee is under the necessity of satisfying an execution on a prior judgment, to preserve his security, he is held by right of substitution to stand in the place of the judgment creditor, and on sale of the land is entitled to receive the amount of the judgment out of the fund as well as the mortgage debt. The payment of the judgment is an act which the mortgagee was compelled to do for his own safety: Silver Lake Bank v. North, 4 Johns. Ch. 370. The principle of subrogation in such case, for purposes of lien and distribution, is familiar, and it often applies when there can be no recovery in a personal action.

It is a clearly established principle that no assumpsit will be raised by the mere voluntary payment of the debt of another person; from such act a request and promise are not implied. Another principle is, that when the plaintiff is compelled to pay the defendant's debt, in consequence of his omission so to do, the law infers that he requested the plaintiff to make the payment for him. As when the plaintiff, at the request of the defendant, left a carriage on the defendant's premises, and the carriage was distrained for rent, it was held that the plaintiff, having paid the rent, could recover it. In such case and the like, it is not permitted to the defendant to defend on the ground that the payment was voluntary. In some cases when a plaintiff has voluntarily performed a duty which the defendant was under a strict legal liability to perform, he may recover the money expended, although there had been no express consent or request by the defendant to the plaintiff's act. As when a man, in the absence of the husband, incurs expense in burying the deceased wife in a manner suitable to the husband's condition.

There was a strict legal liability on the defendant to pay the taxes. And it was his duty. Prompt payment of taxes is to the public advantage. Attempts by him who owes and ought to pay them to evade payment, or shift the burden upon another, ought not to be encouraged. The defendant has shown nothing which in good conscience should relieve him. He wittingly became owner and held possession of the lots subject to the mortgages, and had as little right to create or suffer an encumbrance, which would take preference of the mortgage as the mortgagor would have had, had he remained owner and in possession. The mortgagee was compelled to pay the taxes in relief of the land purchased for his debt, the land not raising a fund sufficient to pay both liens. We are of opinion this is a clear case for application of the principle that he who is compelled to pay another's debt, because of his omission to do so, may recover

on the ground that the law infers that the debtor requested such payment. The plaintiff's first point should have been affirmed.

Judgment reversed, and a *venire facias de novo* awarded.[1]

NICHOLS v. D. P. BUCKNAM.

117 MASS. 488.—1875.

CONTRACT. The first and second counts were for money paid to prevent the enforcement of a mechanic's lien for labor on a block of houses owned by the plaintiff, which money the defendant agreed to pay.

Milo Scott entered into a written contract with the plaintiff to furnish the labor and materials and build a block of houses on the land of the plaintiff in Somerville, for the sum of $5,450. The defendant verbally agreed with Scott to furnish material and do the plaster and brick work of the block, and thereafter actually furnished the material and performed the work. In so doing the defendant employed William E. Bucknam, his brother, with other men, to work on the block; and William E. actually worked on said block for the defendant from August 5, 1870, to October, 1870, charging therefor the sum of $253.25, and agreeing not to call on the defendant for his pay till Scott had paid him. In November, 1870, William E. Bucknam commenced proceedings to enforce his lien against said land and block of houses, and obtained a verdict in the superior court for the county of Middlesex on January 15, 1872, for the sum of $206.82, as damages, and costs taxed at $45.42, though no decree for a sale of the premises was ever entered. The defendant knew of the proceedings to enforce said lien, and was present, and testified in favor of his brother at the trial. The plaintiff, on March 14, 1872, paid William E. Bucknam the amount of said verdict and costs, as above stated, to avoid further proceedings for the enforcement of said lien; and at March term, 1872, of said court, William E. gave the plaintiff a writing acknowledging "full satisfaction of the debt and costs of suit, and of judgment and decree therein," and the same was filed in the court on March 14, 1872. The plaintiff paid $68, as witness and counsel fees in defending said lien suit, and demanded of the defendant, before service of his writ, the sum of $382.21, the amount of said verdict, costs and expenses, which the defendant refused to pay. The plaintiff had overpaid Scott on his contract to the amount of $264, before the commencement of the proceedings, to enforce said lien. Both plaintiff and defendant alleged exceptions.

AMES, J.—It appears upon this report that the plaintiff, in order to

[1]Accord, Phinney v. Foster, 189 Mass. 182 (1905); Irvine v. Angus, 93 Fed. 629 (1899). For a like result through the application at law of the equitable doctrine of subrogation, see Dunlop v. James, 174 N. Y. 411 (1903); Arnold v. Green, 116 N. Y. 566 (1889); 37 Cyc. 384.

save his property from being sold on legal process, has been compelled to pay a debt which was really due from the defendant. Under such circumstances, the law implies a request on the defendant's part, and a promise to repay; and the plaintiff has the same right of action as if he had paid the money at the defendant's express request. Exall v. Partridge, 8 T. R. 308; 1 Smith Lead. Cas. (5th Am. ed.) 70a, 73; Hale v. Huse, 10 Gray 99.

But the costs incurred in defending against the claim stand on other grounds. The judge in the court below has held that they should be disallowed; his decision in matter of fact is conclusive; and there is nothing in the bill of exceptions to show that he erred in matter of law in so holding. * * * Overruled.[1]

TICONIC BANK v. DAVID SMILEY.

27 ME. 225.—1847.

WHITMAN, C. J.—This being an action of assumpsit, to maintain it, there must be evidence of a promise, either express or implied. It is not pretended that there was any express promise. Was there an implied one? The defendant was the holder of a note of hand, made to him by one Homans, and lent it to Thomas Smiley, in order that he might pledge it to the plaintiffs, and thereby obtain delay of payment for a debt he owed them; and he having deposited it for that purpose before it had been indorsed by the defendant, an agent of the plaintiffs called on him to indorse it, and he thereupon put upon the back of the note, "indorser not holden, David Smiley;" at the same time remarking, he had no doubt the note was good, and he was then aware of the object of Thomas in putting the note into the hands of the plaintiffs. It appears that, at the same time, Homans had an account with the defendant, on which there was a balance of $51.80 due from the latter, which, as the note had then been due for a long time, it would be the right of the maker to have set off, as in payment of it *pro tanto,* in whose ever hands it might be found; and this right he availed himself of when sued by the plaintiffs. This balance, it is insisted, under these circumstances, that the defendant must be considered as having impliedly promised to pay to the plaintiffs.

If the defendant is liable for the amount claimed upon the ground of an implied promise, it must be because he has received that amount for the plaintiffs, or because they have paid that amount for him. There is no other possible ground upon which such a promise can be raised. Now, has he received any sum of money for them? It does not appear that he had ever received any sum whatever, expressly in payment of the note. When, therefore, he received the balance due on the account he could not have received it for the plaintiffs. But, by the operation of law, the plaintiffs have been com-

[1] See also, Constantinides v. Walsh, reported herein, ante, p. 39.

pelled, in effect, to pay a debt due from him. The note was transferred to the plaintiffs as being wholly due. Both parties must so have understood it, and so in fact it was, but the maker had a balance of an account against the defendant, constituting a debt due by the latter to the former. This, at the time the plaintiffs took the note, and when the defendant indorsed it, was unknown to them. If the defendant was aware of it, he did not acquaint them with the fact, and from his conduct we must presume it did not occur to him. The plaintiffs, not being apprised of any such claim in set-off, were entitled to find the note free from any such claim, but by operation of law, were, nevertheless, compelled to pay a debt, which in equity and good conscience the defendant should have kept from being so claimed and paid. He therefore may be considered as having, in effect, requested, or perhaps more properly, as having compelled the plaintiffs to pay the amount claimed.

The mode in which the defendant indorsed the note exonerates him, only, from being liable in the case of the avoidance or inability of the maker, and is no bar to a claim like the one here set up. Such indorsements are very common, and the extent of the meaning of them is well understood and defined. It is never understood, in such cases, if payments have been made, or if set-offs can be claimed, when the note exhibits no indication of them, and the indorser leaves the indorsee in entire ignorance of anything of the kind, that the indorser is free from responsibility. Defendant defaulted.[1]

SARGENT v. CURRIER.

49 N. H. 310.—1870.

Assumpsit, by Jacob Sargent against Levi Currier, for money paid, and money had and received. Writ dated May 27, 1868. Plea: The general issue and brief statement of the statute of limitations. The plaintiff claimed to recover $100 and interest from June 2, 1862. One Carter, owning a horse, mortgaged it to one Hill, and afterward sold it to defendant, September 4, 1861; and, in one or two months

[1] In Van Santen v. Standard Oil Co., 81 N. Y. 171 (1880), "plaintiff's complaint alleged in substance that defendant, at the request of S., loaded a vessel with petroleum, and by representations that it had put on board 110 barrels more than it had in fact, induced the master of the vessel to give to S. a bill of lading for that amount in excess of the actual amount loaded, and S. paid defendant therefor; that S. assigned the bill of lading, and the assignees, on arrival, compelled the master to pay for the deficiency. Plaintiff claimed, as assignee of the master, to recover the amount so paid. *Held*, that a demurrer to the complaint was properly overruled; that as the payment was compulsory, caused by the act of defendant, the law implied a promise on his part to repay it."—Syllabus.

after that time, the horse passed by exchange from defendant to plaintiff, and by exchange the horse afterward passed to one Philbrick, and from him to one Hodgdon. Hill then took the horse on his mortgage from Hodgdon, and sold the horse on the mortgage for $100, at an auction sale June 2, 1862; one Sawyer being the purchaser. Hodgdon soon afterward bought the horse of Sawyer and paid him $100.

The defendant, plaintiff, Philbrick and Hodgdon were not aware of the existence of the mortgage, until Hill took the horse from Hodgdon. Upon demand made by Hodgdon, Philbrick paid him $100, and upon demand made by Philbrick, plaintiff paid him $100, plaintiff made demand on defendant, and he refused to pay him anything. This suit was brought within six years of the sale on the mortgage, and the payment made by plaintiff to Philbrick, but more than six years after the contract of exchange between plaintiff and defendant. Two questions were reserved: First, can assumpsit for money paid, or had and received, be maintained? Secondly, is plaintiff's claim barred by the statute of limitations?

SMITH, J.—When the defendant exchanged horses with the plaintiff, he impliedly warranted the title to the horse given by him in exchange, and the defendant thereby became answerable to the plaintiff, in case the title proved defective, whether the defendant knew the defect of his title or not: 1 Par. on Con. 4th Ed. 457-8; 2 Kent's Com. 478. This implied warranty is not confined to the vender's right to sell, but is, in substance, a warranty that his title is perfect, and free from all liens and incumbrances. See Dresser v. Ainsworth, 9 Barbour 619. The plaintiff, having paid Philbrick, who paid Hodgdon, who paid the amount requisite to relieve the property from the mortgage, is entitled, as against the defendant, to be regarded as having himself discharged the incumbrance. The property could not have been relieved from the mortgage without the payment; the payment, therefore, was not voluntary, but compulsory. See GROSE, J., in Exall v. Partridge, 8 Term 308, p. 311; WILDE, J., in Gleason v. Dyke, 22 Pick. 390, p. 393-4. The plaintiff has been compelled to pay money, which the defendant ought to have paid; and which, as between plaintiff and defendant, the defendant was primarily liable to pay. A request may be implied, "if money be paid by a person in consequence of a legal liability to which he is subject, but from which a third person ought to have relieved him by himself paying the amount;" 1 Ch. Pl. 13th Am. Ed. 350, 351; 2 Green. Ev., § 114. It is upon the ground of an implied request that sureties are allowed to maintain a count for money paid against their principals. Hunt v. Amidon, 4 Hill (N. Y.) 345, is an authority to the point, that the vendor of incumbered property is liable, in a count for money paid to the purchaser, who is compelled to discharge the incumbrance in order to retain the property. See, also, Ticonic Bank v. Smiley, 27 Me. 225; Exall v. Partridge, 8 Term 308; McIntyre v. Ward, 18 Vt. 434; Kearney v. Tanner, 17 Serg. & Rawle 94; Francisco v. Wright, 2 Gilman (Ill.) 691, may, perhaps, be regarded as an au-

thority favorable to the defendant. Our conclusion is that the plaintiff may maintain the count for money paid; and that the statute of limitations is not a bar, because the cause of action did not accrue till the money was paid. It is unnecessary to consider whether the other count can be maintained. Case discharged.[1]

---

ii. *Contribution.*

1. CONTRACTORS.

CHIPMAN v. MORRILL & WEBSTER.

20 CAL. 131.—1862.

FIELD, C. J., delivered the opinion of the court. NORTON, J., concurring.—The property of the plaintiff was sold under execution to satisfy a judgment recovered against the plaintiff and the defendants, and this action is brought to enforce payment from the defendants of their proportionate charge. The questions for determination arise upon the pleadings. The papers read on the motion for a new trial we cannot look into, as there is no appeal from the order denying the motion. The complaint sets forth that in December, 1853, the plaintiff and the defendants purchased certain real estate situated in Alameda county, and gave to the vendor, in part payment for the same, their joint promissory note for $11,666, secured by a mortgage upon the property; that the plaintiff by the purchase became the owner of one undivided half of the premises, and each of the defendants became the owner of one undivided fourth; that the note was not paid, and that suit was commenced for the foreclosure of the mortgage, in which judgment was recovered against the plaintiff and the defendants for $11,666, and a decree entered directing the sale of the premises for the satisfaction of the judgment; that under the decree the mortgaged premises were sold, and after the application of the proceeds to the payment of the amount due upon the judgment, there remained a deficiency of $8,040; that, for this deficiency, and the percentage, interest and costs an execution was issued on the 1st of July, 1856, and under it, on the 30th of the same month, property of the plaintiff was sold for the sum of $12,000, and the amount applied to the satisfaction of the deficiency and interest, percentage and costs; that the deficiency was due from the plaintiff and defendants in the same proportions between themselves, as they were the purchasers and owners of the premises; that is, one-half from the plaintiff, and one-fourth from each of the defendants; but as the whole amount was paid by the plaintiff, the defendants are bound to make contribution to him in proportion to their interests. Then follows a prayer for judgment that each defendant be required to pay

[1] For other applications of the principle, see Missouri Pac. Ry. v. Crowell Co., 51 Nebr. 293 (1897); Loomis v. Lehigh Valley R. R., 208 N. Y. 312 (1913).

the plaintiff the sum of $3,000, with interest from July 30, 1856, and for such other and further relief as to equity shall seem meet.

To this complaint, the defendant, Webster, demurred on various grounds, and among others, on the ground that there was a misjoinder of parties, because the cause of action was several against each of the defendants, and on the ground that it appeared that more than two years had elapsed from the time the cause of action accrued before the suit was commenced. The court sustained a demurrer, and the plaintiff declining to amend his complaint, final judgment was entered thereon. The defendant, Morrill, answered, denying, to use the language of his answer, "the greater part of the allegations of the complaint," without saying what those allegations were, and setting up, or rather attempting to do so, the statute of limitations and a discharge under the insolvent law of the state. The plaintiff, instead of demurring to the defective answer, filed a replication to it, denying the bar of the statute and the discharge in insolvency. The case was then submitted upon the pleadings. Upon them the court gave judgment for the defendant. It is from these two judgments, one in favor of the defendant, Webster, on the demurrer, and the other in favor of the defendant, Morrill, on the pleadings, that the appeal is taken.

The appellant, in his argument of the appeal, takes two positions: *First,* that the action is one in equity to enforce a contribution from two or three obligors, to which the statute does not create a bar until after the lapse of four years (Act of April 22, 1850, defining the time for commencing civil actions, § 19); and *second,* that if the action be regarded as depending upon contract, that such contract is founded upon an instrument in writing, and to the action the statute, in consequence, fixes a like limitation of four years.

1. In support of the first position, the appellant cites various authorities upon the doctrine of contributions as between co-sureties, to the effect that such doctrine depends more upon a principle of equity than upon contract. Such is undoubtedly the case as between co-sureties, and the principle is, that where there is a common liability, equality of burthen is equity. Courts of equity, therefore, naturally took jurisdiction of cases of contribution where one surety had paid more than his just proportion. But the equitable doctrine, in progress of time, became so well established that parties were presumed to enter into contracts of suretyship upon its knowledge; and consequently, upon a mutual understanding that if the principal failed, each would be bound to share with the others a proportionate loss. Courts of common law thereupon assumed jurisdiction to enforce contribution between the sureties, proceeding on the principle that from their joint undertaking there was an implied promise on the part of each surety to contribute his share, if necessary, to make up the common loss. Craythorne v. Swinburne, 14 Ves. 164; Sansdale's Administrators and Heirs v. Cox, 7 Mon. 403; Campbell v. Mesier, 4 Johns. Ch. 339; 8 Am. Dec. 570; 1 Madd. 236; Fletcher v. Grover, 11 N. H. 369; 28 Am. Dec. 359. This jurisdiction of the common-law courts did not, however, impair the concurrent jurisdic-

tion of equity. Indeed, in many cases, especially where the sureties were numerous, and some of them insolvent, or where some of the sureties had died, courts of equity were alone adequate to afford a complete remedy. Wright v. Hunter, 5 Ves. 194; Wayland v. Tucker, 4 Gratt. 268; 50 Am. Dec. 76; Couch v. Terry's Adm'rs, 12 Ala. 228.

It is also true that the doctrine of contribution applies equally between those who are original co-contractors; that is, between those who are jointly bound on their own account (not being co-partners), as it does between those who are co-sureties; that is, jointly bound to answer for the debt or default of another. Thus, if a note were given for the cost of a partition wall by the owners of the adjoining premises, between which the wall was constructed, and one of the parties should pay the entire amount of the note, or more than his proportionate part, he could claim a contribution from the other. Campbell v. Mesier, 4 Johns. Ch. 335.

But the present case is not one for contribution between parties who have sustained a common loss upon a common liability. The note of the plaintiff and defendants, upon which the judgment was rendered, was given upon the purchase of real estate in which the parties took separate and distinct interests—the plaintiff one undivided half, and each of the defendants one undivided fourth, and between themselves the obligation of each was to pay for his respective interest. In giving their joint note for the whole amount of the purchase money, each party was principal for the amount of his own interest, and co-surety for the remaining interests. Thus, the plaintiff was principal for one-half of the purchase money and co-surety with Webster for one-fourth of the same for Morrill, and co-surety with Morrill for one-fourth for Webster. Goodall v. Wentworth, 20 Me. 322. When, therefore, the plaintiff paid the entire amount of the judgment recovered upon the note—or what is the same thing, when the proceeds of the property of the plaintiff sold under execution were applied to such payment—he became entitled to maintain an action against the defendants for moneys paid on their account. The demands which he could then assert were several in their character. They were demands not for contribution, but for reimbursement of moneys paid. The action should, therefore, have been against the defendants separately, upon the assumpsit, which the law implies, where a surety is compelled to advance money for his principal. Parker v. Ellis, 2 Sandf. 223; Odlin v. Greenleaf, 3 N. H. 270; Murice v. Hefferman, 13 Johns. 59; Lapham v. Barnes, 2 Vt. 213; Frazier v. Goode, 3 Rich. 199; Babcock v. Hubbard, 2 Conn. 536; Ward v. Henry, 5 Conn. 596; 13 Am. Dec. 119.

Judgment affirmed.

GOLSEN v. BRAND.

75 Ill. 148.—1874.

Mr. Justice Sheldon.—This was an action of assumpsit, brought by Brand against Golsen, for contribution. Otto Hartung and Ida Hartung, his wife, made their promissory note, bearing date February 1, 1873, payable six months after date, with ten per cent. interest, to Jacob Keller. Before the delivery of the note to Keller, Golsen and Brand, at the instance of the maker, Hartung, and on requirement of the payee, wrote their names in blank upon the back of the note, Golsen writing his first; and on the 26th day of July, 1873, Otto Hartung, having previously gone into bankruptcy, Brand paid the note to Keller, and afterward brought this action against Golsen, to recover one-half of the amount so paid. He recovered in the court below, and Golsen appealed.

The obligation which Golsen and Brand assumed by writing their names upon the back of the note, was, under the decisions in this state, that of guarantors. No question is made in this respect, but, inasmuch as the proof shows that Golsen and Brand made the indorsements of their names at different times, not in the presence of each other, and without any agreement or concert between themselves in the matter, it is claimed by appellant that the parties entered into the guarantees they made, severally, and that there is no liability to contribution; that to enforce contribution, the parties must have been joint guarantors. Such a claim is without any legal support. It was enough that the parties were co-guarantors; they were not required to be otherwise joint guarantors. The right to contribution does not arise out of any contract or agreement between co-sureties to indemnify each other, but on the principle of equity, which courts of law enforce, that where two persons are subject to a *common burden,* it shall be borne equally between them. It is well settled that different sureties occupy toward each other the relation of co-sureties, and that contribution may be enforced between them, although they may have become bound jointly, or severally, by different instruments, at different times, and without the knowledge of each other, provided that the obligations into which they enter are for the same engagement and for the same principal, and it does not appear that one obligation was intended to be secondary or collateral to the others. It is sufficient for the right to claim contribution, that it appears that the parties were under obligation to pay the same debt as sureties for a third person. These principles find support in the following, among other authorities: Norton v. Coons, 3 Denio, 132; Armitage v. Pulver, 37 N. Y. 494; Warren v. Morrison, 3 Allen 567; Dering v. Earl of Winchelsea, 1 Lead. Cas. Eq. 131; s. c. 1 Cox's Cases 318; s. c. 2 B. & P. 270; Burge on Suretyship 384-5; Breckenridge v. Taylor, 5 Dana 112; 1 Story's Eq. Ju., sec.

495.[1] We apprehend it is not to be denied that the same rules of contribution govern between guarantors as between sureties.

Appellant's counsel, in support of their view, cite 2 Pars. on Notes and Bills 140, where it is said: "A guarantor is not liable for contribution to a maker, or any other party on a note or bill, or to any person except one who is a joint guarantor with himself." But by "joint guarantor" the author unquestionably meant no more than co-guarantor. The author's text refers only to Langley v. Griggs, 10 Pick. 121, and nothing in that decision justified the use of the word "joint" in the sense which is here claimed by appellant. The same may be said in reference to the other citation, that "the undertaking which is to serve as the foundation of a claim for contribution must be joint, and not separate and successive." 1 Pars. on Contracts 35. In neither citation does there appear any intention to draw a distinction in the case of co-guarantors, or co-sureties, between whether they are bound jointly or severally, and to hold that the right of contribution exists only in the former and not in the latter case. They afford no countenance to such a doctrine. * * * *

It is lastly objected that Brand paid the note before it was due, on the 26th of July, when it was not due until August 1; that there was no present legal liability to pay the note at the time when it was paid, and so no implied request to pay it. But there was evidence in the case, from which the jury might have been warranted in finding an express request by Golsen to Brand to pay the note at the time he did. Besides, it has been held that payment in such a case, before maturity, is not necessarily voluntary, and that eventual liability is equivalent to a precedent request. Craig v. Craig, 5 Rawle, 98.

We perceive no ground for reversing the judgment, and it will be affirmed.

Judgment affirmed.

NORRIS v. CHURCHILL.

20 Ind. App. 668.—1898.

Action by William Churchill against Benjamin F. Norris. From a judgment for plaintiff, defendant appeals. Affirmed.

Black, J.—The appellee sued the appellant for contribution. They, with three others, jointly purchased a horse, each of the five purchasers paying one-sixth part of the price. The remaining one-sixth part of the purchase money they borrowed from a bank upon their joint promissory note payable at said bank upon demand. The appellant, without the knowledge or consent of the appellee, paid to the bank the one-fifth part of the amount of the note in cash.

[1] Accord, Harris v. Ferguson, 2 Bailey (S. C.) 397 (1831).

The other makers thereof, on the same day, gave their joint promissory note, negotiable by the law merchant, to the bank for the balance, being four-fifths of the amount of the debt, the appellant not joining with the other makers in the execution of the latter note. Prior to the appellant's said payment of a part of the debt, two of the makers of the original note, Joseph T. Johnson and Owen Kincaid, had become insolvent, and they so continued thereafter. When the second note became due the makers thereof renewed it, and upon this third note the bank sued and recovered judgment thereon against the makers thereof. The appellee paid the judgment by giving his note, negotiable by the law merchant, to the bank, and the bank assigned the judgment to the appellee. The appellee thus paid all the original debt except the one-fifth part thereof so paid by the appellant. The five makers of the original note owned equal interests in the horse. When the makers of the original note borrowed the money for which it was given, they agreed between themselves that each should pay one-fifth of the amount borrowed.

The questions saved and presented in this court may be disposed of by deciding whether, upon such a state of facts, the appellee was entitled to contribution from the appellant.

It is contended, in effect, that as the appellant paid in cash his agreed share of the original note, and as the balance thereof was paid to the bank by the promissory note, negotiable by the law merchant, of the other makers of the original note, the appellee could not acquire the right to contribution from the appellant by the appellee's final compulsory payment of the balance of the debt represented by the renewed promissory note negotiable by the law merchant, given by the makers of the original note other than the appellant. Each of the makers of the joint obligation was principal as to his part, and co-surety for the others as to their respective parts. Goodall v. Wentworth, 20 Me. 322; Bragg v. Patterson, 85 Ala. 233, 4 South. 716. The right to contribution originated in equity, and is based upon natural justice. It applies to any relation, including that of joint contractors, where equity between the parties is equality of burden, and one of them discharges more than his share of the common obligation. Bragg v. Patterson, *supra;* Aspinwall v. Sacchi, 57 N. Y. 331; Sexton v. Sexton, 35 Ind. 88. Where a number of persons borrowed a sum jointly, but received different portions for their several uses, and one of the borrowers became insolvent, it was held that the others should contribute to pay his share in proportion to the amount received by each. Kincaid v. Hocker, 7 J. J. Marsh. 333. In the case at bar the makers of the original joint note derived benefit equally from the proceeds of that note. When there is an entire debt owed equally by several, the solvent debtors must share equally in any burden thrown upon them by the insolvency of a part of their number. North v. Brace, 30 Conn. 60, 72. Sureties who are insolvent are to be excluded in determining the proportions. See New-

ton v. Pence, 10 Ind. App. 672, 38 N. E. 484; Michael v. Allbright, 126 Ind. 172, 25 N. E. 902.

The agreement between the joint makers of the note that, as between themselves, they were to be bound to discharge the common obligation to the payee equally, each paying his equal share, would not relieve any one of them who had paid his ratable share from the equitable obligation to contribute to another of the joint makers who was compelled to pay more than his ratable share. Such a contract or understanding between the joint makers would not create a relation between them different from that which would exist by law by reason of the makers being bound by a common obligation; for, in such a case, there is an implied contract that each will pay and discharge the common obligation equally. The obligation to make contribution is based upon an implied contract which exists from the date of the creation of the relation between the parties. The right is inchoate from that date. It becomes complete upon payment, but it relates back to the time the relation commenced out of which the right springs. Nally v. Long, 56 Md. 567; Bragg v. Patterson, *supra;* Sexton v. Sexton, *supra.* It is no defense to an action for contribution that the defendant has been released by the original creditor. Clapp v. Rice, 15 Gray, 557. The appellant had not performed his implied contract arising at the original creation of the joint debt. The suit for contribution was not based upon any note or judgment, but was founded upon that implied contract. Equity looks through mere forms to find the natural justice of the whole transaction. Two of the five original joint debtors being insolvent, and the appellee having been compelled to pay, in addition to his own share, the shares of these two insolvents, equity, which is equality, demanded that the debtors who were not insolvent should equally bear the burden of the shares of the insolvents so paid; that the appellant should reimburse the appellee to the extent of one-third of the amount which the latter had thus been compelled to pay in excess of his ratable share of the joint debt.

Counsel for appellee have suggested that no question as to the amount of the recovery was saved by the motion for a new trial, wherein it was assigned as cause that "the damages assessed by the court are excessive," which is the fourth statutory cause, and can be properly assigned only in cases of tort. This suggestion is supported by decisions. Railroad Co. v. Acres, 108 Ind. 548, 9 N. E. 453; Thomas v. Merry, 113 Ind. 83, 91, 15 N. E. 244; Western Assur. Co. v. Studebaker Bros. Mfg. Co., 124 Ind. 176, 182, 23 N. E. 1138. The judgment is affirmed.[1]

[1]An action at law by a surety for contribution from co-sureties must be against each for his proportion and no more can be recovered though some are insolvent; in a suit in equity, however, payment of the whole will be adjudged among the solvent ones in due proportion. Easterly v. Barber, 66 N. Y. 433 (1876). For the remedy in equity, see especially Jewett v. Maytham, 64 N. Y. Misc. 488 (1909), and note thereon in 10 Col. L. Rev. 74.

DEDMAN v. WILLIAMS.

2 Ill. 154—1834.

Lockwood, J.—This was an action brought before a justice of the peace, by Williams against Dedman, for money paid by Williams for the use of Dedman. On the trial before the justice, a judgment was rendered in favor of Williams for $72.37½. The cause was brought by appeal into the Circuit Court of Hancock County, where it was tried before a jury, and judgment for $76.38 recovered. On the trial in the Circuit Court, the plaintiff below proved in substance, that one Whitney and others purchased a number of cattle at an administrator's sale, for which they gave their notes to the administrator. That afterwards the plaintiff and defendant, with another person, purchased half of said lot of cattle of Whitney and others, paying them $30 for their bargain, and agreed to give their note in lieu of said Whitney's note to said administrator, he agreeing to accept plaintiff's and defendant's note with security, for one half of the amount of Whitney's note, which had been given for the original purchase money. That after the purchase made by plaintiff and defendant, and the agreement of the administrator to take plaintiff's and defendant's note for half of the purchase money as aforesaid, plaintiff and defendant took possession of the half of said lot of cattle as their joint property. It was also proved that plaintiff and defendant were to execute their note to said administrator, at some convenient time. That shortly after these contracts, Dedman started with the cattle to Galena, to sell them on the joint account of plaintiff and defendant; that during the absence of Dedman, Williams gave his note with security to said administrator, for the price of said cattle, so purchased of said Whitney. And the said Whitney, upon the surrender of the original note, executed his note to said administrator for the other half of the original purchase money for the cattle bought at said administrator's sale. That when Dedman returned from Galena, he divided with Williams the proceeds of the sale of the cattle. The administrator testified that he held and considered Dedman liable to him on the promise to give his note, and that he had not released him. On this state of the case, Williams brought his suit against Dedman, to recover one-half of the amount for which plaintiff and defendant had agreed to give their joint note with security to said administrator. Some irrelevant testimony was also produced, which it is not necessary to notice. After the plaintiff, Williams, had concluded the testimony as above detailed, Dedman's counsel moved the court to instruct the jury to find for the defendant, as in case of a non-suit, which motion, after argument, was overruled by the court. After this motion was overruled, testimony was introduced by defendant, and other instructions were asked; but from the view taken of the cases it will be unnecessary to notice

any other point except the question whether the Court ought to have instructed the jury that the plaintiff was not entitled to recover upon the evidence that he had adduced.

What was the character of the contract between the plaintiff and defendant? They purchased of Whitney a lot of cattle, and paid him $30 down, and for the remainder of the purchase money agreed to give their joint note to an administrator at whose sale Whitney had purchased the same cattle. When the note was to be made payable does not appear from the testimony. It is, however, a fair presumption that some time was to intervene before it became due. Can, then, one of two joint purchasers of property on a credit, before the time of credit has expired, by giving his individual note for the purchase money, immediately sue his co-purchaser for his proportion of the joint debt? We think not. The rule of law is well settled, that one man cannot make himself, by his own voluntary act, the creditor of another. The relation that existed between Williams and Dedman, by the purchase of the cattle, was that of joint owners or partners, not that of debtor and creditor to each other. Both were bound, when the time of payment arrived, to make payment either to Whitney or to the administrator; and neither could, by any act of his own, coerce payment from the other until the time of payment for the cattle had arrived. Nor would it vary the result of the case if the time of payment for the cattle had elapsed when this suit was brought. The giving of the note by Williams for the property purchased for the joint use of himself and Dedman, was no payment so far as Dedman was concerned. Dedman was certainly bound to pay his moiety for these cattle, either to Whitney or to the administrator of whom Whitney purchased. If his promise to give his note to the administrator should be void under the statute of frauds, upon which point it is unnecessary to give an opinion, he would still be bound to pay Whitney, of whom he and Williams made the purchase. As we, however, consider the law well settled, that one co-partner or co-purchaser can in no case recover, in an action for money paid, against his co-partner or co-purchaser, until the money has actually been paid, nor then until the time of payment has arrived, we are of opinion that the instruction ought to have been given. Had the instruction been given, the plaintiff would doubtless have submitted to a non-suit. This court, therefore, reverses the judgment below, and renders such judgment as ought to have been rendered, to wit, a judgment as in case of non-suit with costs.

Judgment reversed, and judgment of non-suit rendered.[1]

[1] In Witherby v. Mann, 11 Johns. 518 (1814), the court says (p. 520): "The mere giving a bond for the debt of another is no payment; and an action for money paid, laid out and expended for the use of the person for whose debt the obligation is given, will not lie. The money must actually be advanced to sustain the action. (Cummings v. Hackley, 8 Johns. Rep. 202.) But this principle has not been extended to all kinds of securities thus given. There are cases in which negotiable paper has been held equivalent to the

CRAIG v. CRAIG.

5 RAWLE (PA.) 91.—1835.

INDEBITATUS assumpsit, brought by Charles against Thomas Craig, to recover one-half of two bonds, each in the sum of three hundred dollars, in which they were jointly bound to their father, General Craig; the whole of which Charles alleged that he had paid. The declaration contains counts for money paid, laid out and expended; for money lent and advanced; and for money had and received. The plea was *non assumpsit.*

The defendant's counsel requested the answer of the court to the following points, in their charge to the jury. * * * *

2. If the plaintiff voluntarily paid more than his portion of the bonds before they fell due, is he entitled to recover in this action? * * * *

Answer to the second point. If the plaintiff, being one of the co-obligors, did pay the money to General Craig before the bond became due, he is entitled to recover of the defendant his share of the money after the time mentioned for the payment of the bonds has expired, and not before. * * * *

To which opinion of the court the defendant, by his counsel, excepted. * * * *

GIBSON, C. J.—* * * * The exceptions to the charge are not sustained. Proof of payment in money is not absolutely indispensable to a count for money expended to the defendant's use; though it must be admitted that the only exception recognized in the books, is the case of payment in negotiable paper. But the direction on this head was in substantial accordance with the prayer. As to the position taken, that payment before the bonds fell due would be essentially voluntary, it is proper to remark, that the principle was ruled differently in Armstrong v. Gilchrist, 2 Johns. Ca. 429, where it was held that a guarantee of a note who had compromised and paid it for his own indemnity before it had become due, was entitled to recover. That a surety is to wait until payment is extorted from him is not pretended; but it is said that payment before maturity is necessarily voluntary, and that eventual liability is not equivalent to a precedent request. There is no authority for that, and it seems not to be defensible on principle. Why may not a surety take meas-

payment of money, to which it is in some measure analogous, as when the note has been negotiated and is in the hands of an innocent endorsee. He, of course, would be protected; and, unless it was considered as a payment of the original debt, the drawer might be made to pay twice. So when the note has been accepted and paid in satisfaction of the debt. The note, in this case, has not been negotiated, but has been accepted and received by the party in whose favor the judgment was obtained, in satisfaction of the debt, which is sufficient to authorize this recovery. The decisions cited against this apply only to cases where the note or bill has not been accepted in satisfaction for the debt."

ures of precaution against loss from a change in the circumstances of his principal, and accept terms of compromise before the day which may not be obtainable after it. He may ultimately have to bear the burthen of the debt, and may therefore provide for the contingency by reducing the weight of it. Nor is he bound to subject himself to the risk of an action by waiting till the creditor has a cause of action. He may, in short, consult his own safety and resort to any measure calculated to assure him of it which does not involve a wanton sacrifice of the interest of his principal. If then, General Craig delivered these bonds on a promise of payment, absolute or conditional, there cannot be a doubt that actual payment in pursuance of it would entitle the plaintiff to contribution. All that can be said is that it could not have been enforced before the bonds were due. * * * *[1]

---

2. TORTFEASORS.

MERRYWEATHER v. NIXAN.

8 T. R. (K. B.) 186.—1799.

ONE Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover for the machinery belonging to the mill; and having recovered £840 he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial before Mr. Baron THOMSON at the last York assizes the plaintiff was non-suited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrongdoers; and consequently this action upon an implied assumpsit could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the non-suit; contending that, as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages. But

Lord KENYON, C. J., said there could be no doubt but that the non-suit was proper; that he had never before heard of such an action having been brought where the former recovery was for a tort. That the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit. And that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.

[1] The Statute of Limitations begins to run against the co-debtor's right to contribution, from the date of his payment of the debt. But a co-debtor can not compel contribution if he has paid a debt barred by the Statute of Limitations. Hard v. Mingle, 206 N. Y. 179 (1912).

The case of Philips v. Biggs, Hardres, 164, was mentioned by Law, for the defendant, as the only case to be found in the books in which the point had been raised; but it did not appear what was ultimately done upon it.

ARMSTRONG COUNTY v. CLARION COUNTY.

66 Pa. St. 218.—1870.

Read, J.—The bridge across Red Bank creek, between the counties of Armstrong and Clarion, at the place known as the Rockport Mills, was a county bridge, maintained and kept in repair at the joint and equal charge of both counties. Whilst John A. Humphreys was crossing the bridge it fell, and he was severely injured; he brought suit for damages against the county of Armstrong; and on the trial, under the charge of the court, there was a verdict for defendant. This was reversed on writ of error (6 P. F. Smith 204), and upon a second trial there was a verdict for the plaintiff for $1,100 damages, on which judgment was entered. This judgment with interest and costs, was paid by Armstrong county, and the present suit is to recover contribution from Clarion county. On the trial the learned judge non-suited the plaintiff on the ground that one of two joint wrongdoers cannot have contribution from the other.

The commissioners of the two counties had examined the bridge in the summer and ordered some repairs, which were made. There can be little doubt that morally Clarion county was bound to pay one-half of the sum recovered from and paid by Armstrong county; and the question is, does not the law make the moral obligation a legal one? Merryweather v. Nixan, 8 T. R. 186, the leading case on the subject, was of a joint injury to real estate, and for the joint conversion of personal property, being machinery in a mill. In Colburn v. Patmore, 1 Cr. M. & R. 73, the proprietor of a newspaper, who, for a libel published in it, was subjected to a criminal information, convicted and fined, sought to recover from his editor, who was the author of the libel, the expenses which he had incurred by his misfeasance; Lord Lyndhurst said: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime." So in Arnold v. Clifford, 2 Sumner, 238, it was held, a promise to indemnify the publisher of a libel is void. "No one," said Judge Story, "ever imagined that a promise to pay for the poisoning of another was capable of being enforced in a court of justice." In Miller v. Fenton, 11 Paige 18, the wrongdoers were two of the officers of a bank, who had fraudulently abstracted its funds, and of course there could be no contribution between criminals. In the case of The Attorney-General v. Wilson, 4 Jurist 1174, cited in the above

case by the chancellor, and also reported in 1 Craig & Phillips 1, where it was contended that all the persons charged with the breach of trust should be made parties, Lord COTTENHAM said: "In cases of this kind where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is, therefore, not necessary to make all parties who may more or less have joined in the act complained of." Seddon v. Connell, 10 Sim. 81, is to the same effect.

In Story on Partnership, § 220, after speaking of the general rule that there is no contribution between joint wrongdoers, the author says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction, or inference of law. In the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between constructive wrongdoers, whether partners or not." The case of Adamson v. Jarvis, cited by the learned commentators, is in 4 Bing. 66, in which Lord Chief Justice BEST, after noticing Merryweather v. Nixan, says: "The case of Philips v. Biggs," Hardres, 164, (which was on the equity side of the Exchequer), "was never decided; but the court of chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors. From the inclination of the court in this last case, and from the concluding part of Lord KENYON's judgment in Merryweather v. Nixan, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act."

In Betts v. Gibbins, 2 A. & E. 57, Lord DENMAN said: "The case of Merryweather v. Nixan, 8 T. R. 186, seems to me to have been strained beyond what the decision will bear—the present case is an exception to the general rule. The general rule is, that between wrongdoers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself, and Merryweather v. Nixan was only a refusal of a rule *nisi*. In Adamson v. Jarvis, 4 Bing. 66, we have the observations of a learned person familiar with commercial law."

A promise to indemnify against an act not known to the promisee at the time to be unlawful is valid. Coventry v. Barton, 17 Johns. 142; Stone v. Hooker, 9 Cow. 154.

In Pearson v. Skelton, 1 M. & W. 504, where one stage-coach proprietor had been sued for the negligence of a driver, and damages had been recovered against him, which he had paid, and he sought contribution from another of the proprietors, it was held that the rule there, no contribution between joint tort-feasors, does not apply

to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act. The same doctrine was maintained in Wooley v. Batte, 2 C. & P. 417.

These cases have been followed in this court in Horbach's Administrators v. Elder, 6 Harris 33. "Here," said Judge COULTER, "the plaintiff and defendant are *in aequali jure*. The plaintiff has exclusively borne the burden which ought to have been shared by the defendant, who therefore ought to contribute his share."

"Contribution," says Lord Chief Baron EYRE, in Deering v. Earl of Winchelsea, 1 Cox 318, "is bottomed and fixed on general principles of natural justice, and does not spring from contract."

These principles rule the case before us. The parties plaintiff and defendant are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair, which is done. They erred in judgment, and both were liable for the conseqences of that error, and one having paid the whole of the damages is entitled to contribution from the other.

Judgment reversed, and venire de novo awarded.[1]

UNION STOCK YARDS CO. OF OMAHA v. CHICAGO, BURLINGTON & QUINCY R. R.

196 U. S. 217.—1905.

ON a certificate from the U. S. Circuit Court of Appeals for the Eighth Circuit.

Upon this certificate the circuit court of appeals propounds the following question:

"Is a railroad company which delivers a car in bad order to a terminal company, that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation, to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employes on account of injuries he sustained while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

MR. JUSTICE DAY.—We take it that this inquiry must be read in the light of the statement accompanying it. While instruction is asked broadly as to the liability of the railroad company to the terminal company, for damages which the latter has been compelled to pay to one of its own employes on account of injuries sustained,

[1] To recover contribution, plaintiff need not await the result of an action against him; but if he settles without suit, the question of his liability and the amount of damages remains open for determination in the action for contribution. Minneapolis Mill Co. v. Wheeler, 31 Minn. 121 (1883); Smith v. Foran, 43 Conn. 244 (1875).

it is doubtless meant to limit the inquiry to cases wherein such recovery was had because of the established negligence of the terminal company in the performance of the specific duty stated, and which it owed to the employe. For it must be taken as settled that the terminal company was guilty of negligence after it received the car in question, in failing to perform the duty of inspection required of it as to its own employe. The case referred to in the certificate (Union Stock Yards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357) is a final adjudication between the terminal company and the employe, and it therein appears that the liability of the company was based upon the defective character of the brake, which defect a reasonably careful inspection by a competent inspector would have revealed, and it was held that in permitting the employe to use the car without discovering the defect the company was rendered liable to him for the damages sustained. We have, therefore, a case in which the question of the plaintiff's negligence has been established by a competent tribunal, and the inquiry here is, may the terminal company recover contribution, or, more strictly speaking, indemnity, from the railroad company because of the damages which it has been compelled to pay under the circumstances stated?

Nor is the question to be complicated by a decision of the liability of the railroad company to the employe of the terminal company, had the latter seen fit to bring the action against the railroad company alone, or against both companies jointly. There seems to be a diversity of holding upon the subject of the railroad company's liability under such circumstances, in courts of high authority.

In Moon v. Northern P. R. Co., 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679, and Pennsylvania R. Co. v. Snyder, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559, it was held that a railroad company was liable to an employe of the receiving company who had been injured on the defective car while in the employ of the latter company when, under a traffic arrangement between the companies, the delivering company had undertaken to inspect the cars upon delivery, and, as in the Moon Case, where there was a joint inspection by the inspectors of both companies. This upon the theory that the negligence of the delivering company, when it was bound to inspect before delivery, was the primary cause of the injury, notwithstanding the receiving company was also guilty of an omission to inspect the car before permitting an employe to use the same.

A different view was taken in the case of Glynn v. Central R. Co., 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698, in which the opinion was delivered by Mr. Justice Holmes, then chief justice of Massachusetts, in which it was held that, as the car, after coming into the hands of the receiving company, and before it had reached the place of the accident, had crossed a point at which it should have been inspected, the liability of the delivering company for the defect in the car, which ought to have been discovered upon inspection by the receiving company, was at an end. A like view was taken by

the supreme court of Kansas in the case of Missouri, K. & T. R. Co. v. Merrill, 65 Kan. 436, 59 L. R. A. 711, 93 Am. St. Rep. 287, 70 Pac. 358, reversing its former decision in the same case reported in 61 Kan. 671, 60 Pac. 819. But we do not deem the determination of this question necessary to a decision of the present case.

Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done. These cases have, perhaps, their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner. In such cases, where the municipality has been called upon to respond because of its legal duty to keep public highways open and free from nuisances, a recovery over has been permitted for indemnity against the property owner, the principal wrongdoer, whose negligence was the real cause of the injury.

Of this class of cases is Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564, in which a resident of the city of Washington had been injured by an open gas box, placed and maintained on the sidewalk by the gas company, for its benefit. The District was sued for damages, and, after notice to the gas company to appear and defend, damages were awarded against the District, and it was held that there might be a recovery by the District against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general principle was recognized that, notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely *malum prohibitum,* and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury. The same principle has been recognized in the court of appeals of the state of New York in Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 897, the second proposition of the syllabus of the case being:

"Where, therefore, a person has been compelled, by the judgment of a court having jurisdiction, to pay damages caused by the negligence of another, which ought to have been paid by the wrongdoer,

he may recover of the latter the amount so paid, unless he was a party to the wrong which caused the damage."

In a case cited and much relied upon at the bar (Gray v. Boston Gaslight Co., 114 Mass. 149, 19 Am. Rep. 324), a telegraph wire was fastened to the plaintiff's chimney without his consent, and, the weight of the wire having pulled the chimney over into the street, to the injury of a passing traveler, an action was brought against the property owner for damages, and notice was duly given to the gas company, which refused to defend. Having settled the damages at a figure which the court thought reasonable, the property owner brought suit against the gas company, and it was held liable In the opinion the court said:

"When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable or *participes criminis,* and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not in *pari delicto* as to each other, though, as to third persons, either may be held liable."[1]

In a later case in Massachusetts (Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 51 L. R. A. 781, 86 Am. St. Rep. 478, 59 N. E. 657), it was held that a manufacturer of an iron boiler known as a vulcanizer, which had been furnished upon an order which required a boiler which would stand a pressure of 100 pounds to the square inch, which order was accordingly accepted, the manufacturer undertaking to make the boiler in a good and workmanlike manner, but which, because of a defect, in that the hinge of the door was constructed in such a way that it did not press tight enough against the face of the boiler to stand a pressure of 75 pounds, at which pressure the packing blew out and allowed the naptha vapor to escape, was liable for the damages which the hose company had been compelled to pay to one of its employes, injured by the accident, although the defect might have been discovered upon reasonable inspection by the hose company. In that case the boiler was sold upon a warranty. As was said by Mr. Chief Justice Holmes, delivering the opinion of the court:

"The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendant's judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract, the consequences which ensued must be taken to have been contemplated and were not too remote. The fact that the reliance was not justified as toward the men does not do away with the fact that the defendants invited it, with notice

[1] Accord, Churchill v. Holt, 127 Mass. 165 (1879).

of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good."

Other cases might be cited which are applications of the exception engrafted upon the general rule of noncontribution among wrongdoers, holding that the law will inquire into the facts of a case of the character shown, with a view to fastening the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained. In the present case there is nothing in the facts as stated to show that any negligence or misconduct of the railroad company caused the defect in the car which resulted in the injury to the brakeman. That company received the car from its owner, the Hammond Packing Company, whether in good order or not the record does not disclose. It is true that a railroad company owes a duty of inspection to its employes as to cars received from other companies as well as to those which it may own. Baltimore & P. R. Co. v. Mackey, 157 U. S. 73, 39 L. ed. 624, 15 Sup. Ct. Rep. 491. But in the present case the omission of duty for which the railroad company was sought to be held was the failure to inspect the car with such reasonable diligence as would have discovered the defect in it. It may be conceded that, the railroad company having a contract with the terminal company to receive and transport the cars furnished, it was bound to use reasonable diligence to see that the cars were turned over in good order, and a discharge of this duty required an inspection of the cars by the railroad company upon delivery to the terminal company. But that the terminal company owed a similar duty to its employes, and neglected to perform the same, to the injury of an employe has been established by the decision of the supreme court of Nebraska already referred to.

The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, that the case is thereby brought within the class which hold the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of a gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.

In the present case the negligence of the parties has been of the

same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another.

For the reasons stated, *the question propounded will be answered in the negative.*[1]

---

b. Duress by Defendant.

i. *Duress of Property.*

1. PERSONAL PROPERTY.

CHASE v. DWINAL.

7 Greenl. (Me.) 134.—1830.

Assumpsit for money had and received.

The plaintiff was conducting his raft down the Penobscot river, and when he came near the boom of the defendant, which was erected under a charter from the state, he was unable to pass it through the passageway left for that purpose; and by force of the wind and current it was driven eastward of the passage, and stopped by the defendant's boom. The plaintiff, with other assistance, immediately made exertions to free it from the boom and conduct it through the passage, which in two or three hours was effected. One of the defendant's hired men, who assisted the plaintiff, demanded seventy-five cents for this service, which the plaintiff refused to pay. Afterwards the defendant demanded of the plaintiff six dollars and forty cents, being the regular boomage for the raft, which the plaintiff refusing to pay, the defendant stopped and detained the raft till the plaintiff paid the sum demanded; to recover which this action was brought. The jury having found for the plaintiff, the defendant filed exceptions.

Weston, J.—The defendant claims, in behalf of the Penobscot boom corporation, a right to receive and retain as toll, the money attempted to be reclaimed in this action. If he has such a right, the action cannot be supported. The act, establishing this corporation, grants them a toll for stopping and securing the several kinds of timber mentioned therein, whether drifted or rafted down the river. * * * * We are well satisfied that the act imposes the liability to pay toll upon the owners of timber, for the security and preservation of their property; and that it does not attach to rafts, which are intended to pass down the river, where the use and se-

[1] See "Contribution Between Joint Tortfeasors," 11 Col. L. Rev. 665-667.

curity of the boom is not sought or desired. In the second section of the act it is expressly enjoined upon the corporation so to construct the boom as to admit the passage of rafts and boats.

If the defendant was not entitled to boomage, it is secondly contended that the payment, being voluntary, cannot be reclaimed. * *

It has been laid down as a general principle, that an action for money had and received lies for money got through imposition, extortion, oppression, or an undue advantage taken of the party's situation. Moses v. Macferlan, 2 Burr. 1005; Smith v. Bromley, cited in Doug. 696. In Astley v. Reynolds, 2 Strange 916, an action was sustained to recover money, extorted by a pawnbroker, for the redemption of plate; notwithstanding it was objected that the payment was voluntary. In Hall v. Schultz, 4 Johns. 240, Spencer, J., says, this case has been overruled by Lord Kenyon in Knibbs v. Hall. [1 Esp. 84.] There the plaintiff had paid, as he insisted, five guineas more rent than could have been rightfully claimed of him, to avoid a distress which was threatened. Lord Kenyon held this to be a voluntary payment, and not upon compulsion; as the party might have protected himself from a wrongful distress by replevin. His lordship does not advert to the case of Astley v. Reynolds; and subsequently, in Cartwright v. Rowley [2 Esp. 723] before cited, he refers with approbation to an action within his recollection, for money had and received, brought against the steward of a manor, to recover money paid for producing at a trial some deeds and court rolls, for which he had charged extravagantly. It was urged that the payment was voluntary; but it appearing that the party could not do without the deeds, and that the money was paid through the urgency of the case, the action was sustained. Had the distress, threatened in Knibbs v. Hall, been actually made, money paid to relieve the goods, could not have been recovered in *assumpsit,* upon a principle which will be subsequently noticed.

Hall v. Schultz [4 Johns. 240], cited by counsel for the defendant, was commented upon in Gilpatrick v. Sayward, 5 Greenl. 465. Neither of these actions could be sustained without a violation of the statute of frauds; and upon this ground they were defeated. In Stevenson v. Mortimore, Cowper 805, the plaintiff recovered, in an action for money had and received, an excess of fees by him paid to a custom-house officer, to obtain a document he was under the necessity of procuring. In Ripley v. Gelston, 9 Johns. 201, the plaintiff recovered in *assumpsit* of the collector of New York, money illegally claimed by him as tonnage and light money; and which the plaintiff paid to obtain a clearance of his vessel. In Clinton v. Strong, 9 Johns. 370, money was reclaimed, which had been wrongfully exacted by the clerk of the district court, for the redelivery of property which had been seized. In the foregoing cases the payments were not deemed voluntary, but extorted and compulsory.

It may be insisted that trespass or replevin would have been more appropriate remedies for the plaintiff. Either might doubtless have been maintained; and where they are specific remedies, provided by

law for a peculiar class of injuries, *assumpsit* cannot be substituted. It was upon this ground that Lindon v. Hooper, Cowper 414, was decided. Cattle damage feasant had been wrongfully distrained, money had been paid for their liberation, and an action for money had and received brought to recover it. The action did not prevail. The court place their opinion expressly on the nature of the remedy by distress, which they say is singular, and depends upon a peculiar system of strict positive law. That the distrainor has a certain course, prescribed to him, which he must take care formally to pursue; and that the law has provided two precise remedies for the owner of the cattle, which may happen to be wrongfully distrained, replevin and, after paying the sum claimed, trespass, in which such payment must be specially averred and set forth as an aggravation of the trespass. Then are to follow pleadings, which put directly in issue the validity of the distress. From a case of this peculiar character, decided upon this special ground, no general principle can be extracted which can govern cases, where the law of distress does not apply.[1]

Irving v. Wilson, 4 D. & E. 485, is a case strongly resembling the one, now before the court. A revenue officer had seized goods, not liable to seizure, but demanded money for their release, which the owner paid. This was recovered back in an action for money had and received. It was held to be a payment not voluntary, but by coercion, the defendant having the plaintiff in his power, by stopping his goods. It does not appear to have occurred to the counsel or the court that it was a case which was affected by the decision in Lindon v. Hooper.

Trespass would have been an appropriate remedy for the unlawful seizure; but after payment, *assumpsit* was also appropriate. The money was extorted. The payment was not voluntary in any fair sense of that term; and the defendant had no just title to retain it. If money is voluntarily paid to close a transaction, without duress either of the person or goods, the legal maxim, *volenti non fit injuria,* may be allowed to operate. It would be a perversion of the maxim to apply it for the benefit of a party, who had added extortion to unjustifiable force and violence.

[1] In Colwell v. Peden, 3 Watts (Pa.) 327 (1834), the landlord issued a warrant of distress in good faith to recover rent alleged to be in arrear, though none was due. The tenant, to relieve his goods from distress, paid the sum claimed and then sued in this action of assumpsit to recover back the money. The court said, in conclusion: "There seems, therefore, to be much force in the remark of Mr. Starkie [on Evidence] that 'the plaintiff cannot substitute this form of action for the more appropriate ones of trespass or replevin, where they are the specific ones provided by the law for the particular grievance.' In either of these the question may be tried as advantageously for the tenant as in an action of assumpsit; nor is there any reason why he should be suffered to turn a cause of action essentially local into a transitory one by changing the form of the remedy and shifting the position of the parties to the issue. This last consideration was decisive of the form of the action in Mather v. Trinity, 3 Serg. & Rawle 509; and would, of itself, be decisive of it here. On principle, as well as authority, then, a tenant cannot maintain assumpsit for money paid to relieve his goods from distress."

The party injured often finds a convenience, in being allowed to select one of several concurrent remedies. In the case under consideration, replevin would have restored the property unlawfully seized. But to procure a writ, and an officer to serve it, would have occasioned delay, which might have subjected the plaintiff to greater loss than the payment of the money demanded. Besides, he must have given a bond to the officer to prosecute his suit; and he might meet with difficulty in obtaining sufficient sureties. Had he brought trespass, several months might have elapsed, before he could have obtained a final decision; and this delay might have been attended with serious inconvenience. By the course pursued, these difficulties were avoided. Nor is the defendant placed by it in any worse situation. He has been permitted to urge in his defense any claim of right under the corporation, and he is liable to pay only the money actually received by him; the plaintiff waiving, by the form of the action, damages for the illegal seizure. We perceive no objection in principle to the form of the action; nor do we find it unsupported by precedent and authority. Exceptions overruled.[1]

SCHOLEY, Ex'r, v. MUMFORD et al.

60 N. Y. 498.—1875.

Action to recover back moneys paid under the circumstances stated in the opinion. Plaintiff and G. H. Mumford were executors of the will of Elizabeth Scholey; defendants were Mr. Mumford's executors.

Rapallo, J.—* * * * The defendants had in their possession

[1] In Cobb v. Charter, 32 Conn. 358, 366 (1865), the court says: "The plaintiff was a mechanic. His chest of tools, which are held by statute sacred even from the touch of a creditor, were seized by the defendant. He refused to deliver them to the owner on demand except upon his paying, without the slightest obligation, the debt of another person. The plaintiff was thus deprived of the means of his support. Thereupon he left the money with Stratton to be paid to the defendant when the chest should be sent. Stratton so informed the defendant, who at once sent the chest and then received the money. In view of such extortion, oppression, and taking an undue advantage of the plaintiff's situation, it seems somewhat bold in the defendant to come into a court of justice and assert that the payment was voluntary."

In Harmony v. Bingham, 12 N. Y. 99, 112 (1854), the court says: "The property consisted of merchandise of great value, which had been transported to a remote part of the country, in reference to a commercial adventure in Mexico. Every precaution had been taken by the plaintiff to procure its transportation in the shortest practicable period, and it was essential to his interest that he should obtain possession of it immediately on its arrival. The defendants refused to deliver the property without the payment of a greater sum for freight than they could legally claim. The plaintiff protested against the payment of what he considered an illegal and extortionate charge, and finally, from the necessity of the case, and for the purpose of obtaining possession of his property, he paid the illegal demand. I think that a payment, under such circumstances, should not be considered as voluntary."

$85,000 of bonds belonging to the estate of which the plaintiff was surviving executor. These bonds had come to the possession of the defendants through George H. Mumford, deceased, who was, in his life, the co-executor, with the plaintiff, of the will of Mrs. Scholey. The complaint alleges that the defendants refused to deliver these bonds to the plaintiff until the sum in controversy, which was alleged by the defendants to be due to the estate of George H. Mumford, deceased, for commissions, was paid to them, and that this claim was disputed by the plaintiff. The parties appeared before the surrogate, who, in the first instance, decided that the defendants were entitled to the commissions. The plaintiff then paid them, and afterward applied to the surrogate for a rehearing upon the question, and upon such rehearing the surrogate reversed his former decision. The complaint alleges that the plaintiff, although advised that the first decision of the surrogate was erroneous, nevertheless paid the sum claimed, in order to obtain the delivery of the bonds to him. The defendants, in their answer, do not deny the allegation of the complaint that they refused to deliver up the bonds except upon payment of the commissions, but, on the contrary, expressly admit "that they would not have delivered up the bonds except upon the terms aforesaid," *i. e.*, the payment of the commissions. The plaintiff testified that he was anxious to get the bonds; that the defendants had, after the death of George H. Mumford, declined to give up the bonds, on the ground that commissions were due. The evidence is very meager; but I think it sufficiently appeared, from the acts of the parties and the admission in the answer, that this claim for commissions was disputed, and was yielded to simply as a means of obtaining possession of the bonds to which the plaintiff was entitled, and which the defendants withheld from him for the purpose of coercing payment of the commissions.

To constitute a voluntary payment the party paying must have had the freedom of exercising his will. When he acts under any species of compulsion the payment is not voluntary. If a party has in his possession goods, or other property, belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and, in order to obtain possession of his property, he pays that sum, the money so paid is a payment made by compulsion, and may be recovered back. (Per BAYLEY, J., Shaw v. Woodcock, 7 B. & C. 73.) This has been frequently decided. Where a pawnbroker refused to deliver plate pawned, except upon payment of excessive interest, and the owner paid it to obtain his property, he was allowed to recover back the excess. Astley v. Reynolds, 2 Stra. 915. An action will lie to recover back money paid to release goods wrongfully detained on a claim of lien: Ashmole v. Wainwright, 2 A. & E. N. S. 737; Harmony v. Bingham, 12 N. Y. 109, 116; or money wrongfully exacted by a corporation as a condition permitting a transfer of stock. Bates v. N. Y. Ins. Co., 3 Johns. Cas. 238. The cases to this effect are numerous. In all these cases the payment is regarded as compulsory,

and not voluntary. I think the case at bar falls within the principle of these decisions. The amount of property was very large compared with the sum exacted; and, from the conduct of the plaintiff, it may well be inferred that he preferred to pay it and take the chances of recovering it back, rather than to incur the hazard of having so large an amount of property in the hands of the defendants.

The claim of the defendants, that after the surrogate had decided that the defendants were entitled to the commissions, the plaintiff gave up the controversy, and consented to abide by the decision, is not sustained by the facts. The uncontroverted allegations of the complaint, that the defendants refused to deliver the bonds unless the commissions were paid; and that, after the first decision of the surrogate, the plaintiff, although advised that the decision was erroneous, did, nevertheless, pay them, in order to have the bonds delivered up to him, coupled with the steps which were very soon afterward taken by the plaintiff to obtain a reversal of the decision of the surrogate; and the allegations in the answer, that, after the first decision, the defendants notified the plaintiff that they would deliver up the bonds on payment of the amount claimed by them, and that they would not have delivered up the bonds except upon the terms aforesaid, sufficiently define the positions of the parties, and show that the payment was not the free and voluntary act of the plaintiff; but that he had no choice, and was compelled to submit to the demand in order to obtain immediate possession of the bonds.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

All concur; except MILLER, J., dissenting.

Judgment reversed.[1]

[1] This case came again to the court of appeals in 72 N. Y. 578 (1878), and was again decided for the plaintiff, but upon the ground stated as follows by the court: "We think the case is with the plaintiff on the ground now to be stated. The original decision of the surrogate was doubtless erroneous, and having been subsequently reversed and set aside, the plaintiff was then entitled to recover the money paid under the erroneous order. In Clark v. Pinney (6 Cow. 299), the court says: 'That this action (*indebitatus assumpsit*) lies in all cases where the defendant has in his hands money which, *ex aequo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment, which, subsequent to the payment of the money is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected; of course, he is entitled to have it returned to him.' The same principle is recognized in subsequent cases. Maghee v. Kellogg, 24 Wend. 32; Garr v. Martin, 20 N. Y. 306."

RICHMOND ET AL. v. UNION STEAMBOAT CO.

87 N. Y. 240.—1881.

EARL, J.—On the 1st day of October, 1875, the agent of the plaintiffs, at Toledo, shipped on board the propeller "Jay Gould," which was owned by defendant, a common carrier, consigned to the plaintiffs at Buffalo, seven thousand bushels of wet wheat. There was also shipped upon the propeller and consigned to other parties at Buffalo, upwards of twenty thousand bushels of wheat. The propeller went to Buffalo and discharged all the wheat into the Niagara elevator, and refused to discharge plaintiffs' wheat, upon their request, into the Richmond elevator. After plaintiffs' wheat was discharged at the Niagara elevator, in order to obtain the same so as to place it in the Richmond elevator, they were required by the defendant's agent to pay the freight, to-wit, $183.66, and also incurred expense to the amount of $80.75 in removing the wheat to the Richmond elevator. The plaintiff's claim that the defendant did not earn freight by delivering the wheat into the Niagara elevator, but that they were obliged to pay the freight under duress, in order to procure the wheat, and this action was brought to recover the amount paid for freight, as well as the expense of the removal of the wheat.* * * *

Upon the question, then, of the defendant's liability, we think no error was committed in the court below. But we are of the opinion that the plaintiffs should not have recovered the freight paid. As the case now stands, the defendant has been put to the expense of carrying and delivering the grain into the Niagara elevator without any compensation whatever. This is certainly unjust and unwarranted. Either the plaintiffs should recover the freight paid only on the ground that that was paid under duress when it was not due to the defendant, or they should recover what it cost them to complete the defendant's contract. We are of opinion that the latter is the most just and equitable rule. That gives the plaintiffs precisely what they would have had if the contract had been performed, as they claim it should have been. They took the grain at the Niagara elevator and paid the entire freight stipulated. Then they caused the grain to be carried and placed in the Richmond elevator, and for that incurred an expense of $80.75, and that amount will furnish them a full indemnity for the defendant's breach of contract.

The judgment below must, therefore, be modified by striking therefrom $183.66, and the interest thereon, and as thus modified, the judgment should be affirmed, without costs of appeal, to either party in this court.

All concur. Judgment accordingly.

DE LA CUESTA v. INSURANCE CO. OF NORTH AMERICA.

136 PA. ST. 62.—1890.

ASSUMPSIT against the president and directors of the Insurance Company of North America, to recover back the sum of $7,000, paid by the plaintiff to the defendant company under protest.

The stockholders of the North American Insurance Company resolved that it would be advisable to increase their capital stock. By the resolution the stock was to be increased one-half. That is to say, for every two shares one was to be issued. Those shares were to be issued as being of the par value of the stock of $10 per share; that amount to be paid by the persons who subscribed for it; the effect of which would be to add to the capital stock of the company $1,000,000. A majority of the stockholders were of the opinion that a still further increase of the assets of the company was advisable. They therefore desired that the right to subscribe for an additional one hundred thousand shares at $10 per share should be on condition that, in exercising it, whoever subscribed $10 for one of the new shares of the stock should also pay $10 for the privilege of being admitted to the new subscription. Under the ruling of the supreme court, this condition was illegal.

Under these circumstances, the new stock was issued and scrip was to be given for it, and any man who came forward and paid, as the payments fell due, at the rate of $10 for each share, and who, after having made those payments, continued to pay $10 for the privilege of buying a share and becoming a stockholder, would become entitled to his proportion of these new shares of stock. If, however, he did not comply with all these conditions, including the condition which required him to pay $10 for the privilege, he would forfeit his right to the new stock, and, moreover, that stock would be sold to the highest bidder and acquired by third persons, which would introduce a new element into the company.

Under these circumstances, the plaintiff paid the $10 which were necessary to buy the stock, and the $10 which were necessary to entitle him to the privilege of buying, declaring that he did it under protest.

Mr. Chief Justice PAXSON.—* * * * The only important question presented by this record is the legal effect of payment under protest. The plaintiff was entitled, under Cunningham's Appeal, *supra*,[1] to subscribe for the new stock at par. The company required him to agree to pay an additional sum at a future time for the privilege of subscribing. This bonus, as it was called, was to be added to the surplus fund. This, however, is not material. He signed the contract to pay the additional sum, under protest, and

[1] 108 Pa. 547.

paid under protest. This suit was brought to recover back the money thus demanded. This is the whole case. * * * *

Applying the law as we find it to the facts of this case we are of opinion there was no duress. It is a duress either of person or goods that constitutes the coercion. It is not pretended that there was a duress of person, nor was there anything to show duress of goods. There was nothing but the denial of a right, and a declared intention not to recognize a right is not duress. It is true, the denial of the right placed the plaintiff in a "dilemma," to use the expression of Judge HARE in Dawson's case. But if we adopt the principle that whenever a man is placed in a position in which the law is doubtful, and he is compelled to choose between two paths, in other words, to decide between conflicting views of the law, he is to be considered as under duress, we shall certainly multiply litigation, even if no other end is accomplished.

It is fair to test this question by supposing the company to have done what it is alleged they threatened to do. Suppose the plaintiff had tendered the company the par of the new shares to which he claims he was entitled; that the company had declined to accept it, and had sold the right to subscribe for a corresponding number of shares. How would this have affected the rights of the plaintiff? The company could no more have sold his stock than they could have sold his house. If he had a right to certain shares by paying $10 each therefor, that right could not have been divested by a sale of them by the company, nor by any other action on its part. His rights as a stockholder were fixed by the law; a certificate would have added nothing to them; it would have been evidence, nothing more, that he owned stock, but that already appeared upon the books of the company. The duress, if any, was not of a thing, of goods or chattels, but of an incorporeal right. Had the stock been sold he would have had no contest with the purchaser, as he would have necessarily had if a corporeal thing, or the title to a corporeal thing had been sold accompanied by delivery of possession. He had to do only with the company; and, after tender of the par, could have brought this suit and recovered, as before stated, the market value of the stock, and if he wanted shares, with the money thus recovered could have bought a corresponding amount of other shares.

It was urged, however, that this case is upon all fours with Motz v. Mitchell, *supra,*[1] where there was duress of an unrecorded deed, while in the case in hand there was duress of stock. This argument involves the assumption that a certificate had been issued for the new shares, which certificate the company unlawfully withheld from the plaintiff. In point of fact, the plaintiff never had a certificate for the new shares, for none had been issued. The plaintiff had a right to demand a certificate for them upon payment of the par, and to sue them for a refusal, as before stated. That there could not be duress of this right is too plain for argument. There was not duress of per-

[1] 91 Pa. St. 114.

son or goods; there was simply the denial of a right; a refusal to issue shares of stock to which the plaintiff was entitled, and for which refusal he had a full, complete, and convenient remedy at law. We may concede that the action of the company placed him in a "dilemma"; he had to choose between two roads, neither of which he may have regarded as safe. In other words, he was uncertain as to his legal rights under the scheme proposed by the company. The "dilemma" was the uncertainty of the law. There was no other pressure or duress that caused the payment. However great the uncertainty of the law may be in particular cases, it has never been supposed to amount to duress of either person or goods. It was nothing more than is experienced by every lawyer in the course of his practice. He is often called upon to advise where the law is uncertain; and, in all such cases, the client must take the risk.

We attach little importance to the suggestion that the company was acting in a fiduciary capacity. This was a matter really between the stockholders, and they were evidently dealing at arms' length. The corporate organization was the means by which their scheme was carried through.

Fortunately, the plaintiff suffers no injury by the affirmance of this judgment. He receives his proportion of the new shares at the same price at which they were issued to the other stockholders. It is true he does not get shares at $10 for which others paid $20, but his equity in this respect is not strong.

We find no error in this record.

Judgment affirmed.[1]

Mr. Justice STERRETT and Mr. Justice CLARK dissented.

[1] As an appendix to 136 Pa. there is printed (pp. 658-666), at the request of members of the bar, the opinion of J. I. Clark Hare, P. J., of the Court of Common Pleas of Philadelphia county, in discharging the rule for a new trial in Dawson v. Insurance Co., which was argued with the *De La Cuesta* case in the supreme court. The opinion constitutes a valuable monograph on recovery of money paid under duress of property.

In Bates v. New York Ins. Co., 3 Johns. Cas. 238 (1802), Butler had subscribed for fifty shares of the defendant company, and thereafter assigned his right to the shares to plaintiff, who fulfilled all the conditions of the subscription. But the defendant refused to transfer the shares to plaintiff unless he would pay to defendant a debt of $465 which Butler owed to defendant. Plaintiff then paid Butler's debt and the defendant transferred the shares. Plaintiff later sued to recover back the money paid to defendant, and the court said (p. 242): "On the whole, we are of opinion that the $465 could not, under all circumstances, be considered a voluntary payment, but as made, in some measure, by compulsion, an undue advantage having been taken of the plaintiff's situation, and that he ought to recover it back." In Brown v. Worthington, 142 S. W. 1082 (St. Louis, Mo. Ct. of Appeals, 1912), defendant had given plaintiff an option to purchase a lot of hogs within thirty days. Within that time plaintiff resold part of them but defendant refused to deliver unless plaintiff would pay more than the option price. Plaintiff in order to perform his contract of resale, paid the demanded excess and later sued to recover it back on the ground of duress. Held the action would lie.

McMURTRIE v. KEENAN.

109 Mass. 185.—1872.

The maker of a note secured by a mortgage with power of sale, paid the interest due thereon; and the mortgagee promised to indorse the payment on the note, but did not do so, denied that interest had been paid, demanded it again, and threatened to sell under the mortgage unless the interest was again paid. The mortgagor then paid the interest a second time, under protest.

Chapman, C. J.—If a defendant in an action has paid money to the creditor to be indorsed or applied on the demand in suit, but suffers the plaintiff to take judgment for the whole amount, he cannot recover the money back. He has had his day in court, and the judgment is conclusive. Public policy requires that this should be so. Loring v. Mansfield, 17 Mass. 394; Jordan v. Phelps, 3 Cush. 545; Sacket v. Loomis, 4 Gray 148; Fuller v. Shattuck, 13 Gray 70; Nettleton v. Beach, 107 Mass. 499. But if, after the creditor thus neglects to indorse or apply it, he has the means of collecting the whole debt without giving the debtor any day in court, and does so collect it; as, for example, by warrant of distress, or by selling a pledge, or by a mortgage with power of sale, or by collecting securities which are under his control, then the debtor may recover back the money which has thus been paid and not applied. There is no judgment or other proceeding which estops him.

In this case the jury have found that the plaintiff paid $120 for interest, which the defendant promised to indorse, but did not. But, having his note secured by mortgage with power of sale, he threatened to make a sale unless the plaintiff would pay the interest which he claimed. He could do this without giving the plaintiff any day in court. The plaintiff is therefore entitled to recover back the sum that ought to have been indorsed. Exceptions overruled.

---

2. REAL PROPERTY.

JOANNIN et al. v. OGILVIE et al.

49 Minn. 564.—1892.

Action on a note. By his answer, Ogilvie admitted his liability on the note, and for counterclaim alleged that on January 31, 1890, he owned lots Nos. 93 and 95 in Block 47 in Duluth proper, and had erected buildings thereon; that he bought doors, sash, and other goods of one A. H. Thompson, a retail dealer, and paid him for them, and used them in the buildings. Thompson had previously pur-

chased these goods with others from plaintiffs, the manufacturers, to sell again at retail to his customers. Thompson was indebted to plaintiffs on account for goods so bought of them, but Ogilvie did not know this. On that day plaintiffs made and filed for record a lien statement, claiming to be due them from Thompson $682.50, and that he was a contractor with Ogilvie to furnish material for the buildings on the lots. This claim was incorrect and the lien invalid. Ogilvie was largely indebted, and pressed for money, and was negotiating for a loan of $15,000, to be secured by his mortgage on this real estate. The lenders refused to make this loan unless this lien was removed. Plaintiffs refused to discharge it of record unless Ogilvie paid Thompson's debt to them. He paid it under protest March 19, 1890, and in this action asked judgment against plaintiffs for the amount so paid (after deducting the amount due them on the note). The court found the payment by Ogilvie to plaintiffs was made under duress, and directed judgment as prayed in his answer.

MITCHELL, J.—* * * * The distinguishing and ruling fact in this case was the active interference of plaintiffs with defendant's property by filing the claim for a lien, which effectually prevented the defendant from using it for the purposes for which he had immediate and imperative need. It was this active interference with the property, and not the necessitous financial condition of the defendant, which constituted the controlling fact. The latter was only one, and by no means the most important, of the circumstances in the case. Counsel for plaintiffs seems to assume that the filing of the claim for a lien was the commencement of a judicial proceeding for its enforcement, and therefore, within the doctrine of cases cited by him, that the subsequent payment of the claim was voluntary, because defendant might have interposed his defense in these proceedings. But this is clearly wrong. Filing a lien is in no sense the commencement of judicial proceedings. The only remedies open to defendant were either to commence a suit himself to determine the validity of plaintiffs' claim, or wait, perhaps a year, until the latter should commence a suit to enforce it. But with a large indebtedness hanging over him, an overdue mortgage on this very property upon which foreclosure was threatened, with no means to pay except money which he had arranged to borrow on a new mortgage which he had executed on this same property, $13,000 of which was withheld and could not be obtained until plaintiffs' claim of lien had been discharged of record, it is very evident that neither of the remedies suggested "would do defendant's business." He was so situated that he could neither go backward nor forward. He had practically no choice but to submit to plaintiffs' demand. Had it been goods and chattels which plaintiffs had withheld under like circumstances, there would be no doubt, under the doctrine of Fargusson v. Winslow, *supra* [34 Minn. 384], but that the payment would be held to have been made under duress. But while filing the lien did not interfere with defendant's possession of the land, yet it as effectually deprived him of the use of it

for the purposes for which he needed it as would withholding the possession of chattel property.

It has been sometimes said that there can be no such thing as duress with respect to real property, so as to render a payment of money on account of it involuntary. But this is not sustained by either principle or authority. In view of the immovable character of real property, duress with respect to it is not likely to occur as often as with respect to goods and chattels. But the question in all cases is, was the payment voluntary? and for the purpose of determining that question there is no difference whether the duress be of goods and chattels, or of real property, or of the person. Fraser v. Pendlebury, 31 Law J. C. P. 1; Pemberton v. Williams, 87 Ill. 15; Close v. Phipps, 7 Man. & G. 586; White v. Heylman, 34 Pa. St. 142; State v. Nelson, *supra* [41 Minn. 25]. Considerable stress is placed upon defendant's silence and apparent acquiescence for a considerable time after he paid the plaintiffs' claim. This might have some bearing upon the question whether the payment was voluntary or involuntary; but if it was in fact the latter, and a cause of action to recover back the money accrued to defendant, it would be neither waived nor barred by his subsequent silence or delay in asserting his right of action. Judgment affirmed.[1]

[1] Compare Wessel v. Johnston Land and Mortgage Co., 3 N. Dak. 160 (1893).

In First Nat. Bank of David City v. Sargeant, 65 Neb. 594 (1902): "S. had conveyed, by a warranty deed absolute in form, to a bank certain real estate as security for an indebtedness owing by S. to the bank. S. was in financial distress, and had no means of meeting his indebtedness save by a sale of the real estate. The bank thereafter assumed to be the absolute owner of the property and denied to S. any right, interest or equity therein, and by injunction proceedings undertook to dispossess him of a portion of such land. S. procured a purchaser at an advantageous price, and endeavored to adjust his differences with the bank, so as to effectuate a sale of the property, and meet pressing demands against him. The bank refused to consent to a sale or release its interest or reconvey the premises to S. so that a sale might be consummated without the payment by S. of a large sum of money in excess of the amount justly due. *Held*, under the facts and circumstances as disclosed by the record, that the payment of the excess over and above the amount justly due was made under duress and compulsion, and might be recovered back in an action brought for that purpose."—(*Syllabus.*)

In Wells v. Adams, 88 Mo. App. 215, 225 (1901), the court says: "The case here is that the defendants 'held the plaintiff by the wrists'—they had a large incumbrance on his lands. He was being pressed by other creditors and unless he could secure a release of the defendants' incumbrance, and thus be enabled to make a disposition of the property, he was likely to become a bankrupt, or, at last, suffer a great sacrifice and loss of his property. In order to extricate himself from this embarrassing situation he must have his property disincumbered, and this could be accomplished only by the payment of the defendants' illegal exaction. He was practically confronted with the question whether or not he should pay the defendants the amount exacted or suffer the serious consequences to be reasonably apprehended from a refusal to do so. The payment under such circumstances, it seems to us, would be under an urgent necessity—under a kind of moral duress. Duress may be shown with respect to real property as well as personal so as to render pay-

ii. *Injury to Business.*

PANTON ET AL. v. DULUTH GAS & WATER CO.

50 MINN. 175.—1892.

DICKINSON, J.—The defendant is a corporation owning and operating the water works by which the city of Duluth is supplied with water, and authorized by law to charge for water supplied to the inhabitants at specified rates, measured by the quantity supplied. The plaintiffs occupy a building in the city for mercantile purposes, and keep in their service therein some forty or fifty employes. The only water supply for the premises is that afforded by the defendant. There are three water-closets in the building, and faucets elsewhere for drawing water, these all being supplied with water in the usual manner. The water thus supplied is used for the closets, for sprinkling, washing floors and windows, for drinking, and for the ordinary daily use of the persons in the building, but not for culinary purposes. The defendant made a demand on plaintiffs for payment of a specified sum for use of water during a particular period. The plaintiffs refused to pay that sum, claiming that the water meter on the premises, put in by the defendant, did not correctly measure the amount of water passing through it, and that the amount of water for which the charge was made was much in excess of the amount actually used. The defendant was about to shut off the water supply from the building because of such refusal, as it assumed the right to do, when the plaintiffs, in order to prevent the water being shut off, paid the sum charged, under protest, and now prosecute this action to recover back the amount of the alleged overcharge.

1. Upon the question of fact as to the water meter having erroneously indicated the amount of water passing through it, the jury found in favor of the plaintiffs. The court, considering that the evidence did not justify the verdict, granted a new trial. Upon this point the case of Hicks v. Stone, 13 Minn. 434 (Gil. 398), and the numerous decisions in which the rule there announced has been reaffirmed and applied, is conclusive. The evidence was such as to justify the order.

2. The question is presented, and may be expected to again arise upon a second trial, whether the circumstances under which the plaintiffs made the payment were such that the payment may be regarded as having been so far compulsory or necessary that an action will lie to recover it back. We are of the opinion that it is to be so regarded. In buildings as now constructed in populous

ment on account of it involuntary and permit it to be recovered back. Joannin v. Ogilvie, 49 Minn. 564; Pemberton v. Williams, 87 Ill. 15; White v. Heylman, 34 Pa. St. 142; Fraser v. Pendlebury, 31 L. J. Cp. 1." Accord, Kilpatrick v. Germania Ins. Co., 183 N. Y. 163 (1905); Rowland v. Watson, 4 Cal. App. 476 (1906).

cities, where there is an adequate supply of water, and especially in buildings occupied by so many persons as are shown to have been employed in the plaintiffs' store, water-closets may well be regarded as reasonably necessary. The closets provided for use on these premises, and comprising a part of the building, would have been useless unless supplied with water; and there was no other practicable source of supply save that afforded by the defendant. The defendant was under legal obligation to supply water at the proper price. It was the plaintiffs' right to have it thus supplied. The defendant of its own will merely, and without any legal determination as to the disputed fact upon which the exercise of such a power depended, was about to cut off the whole water supply from these premises. This was a kind of execution in advance of judgment. The plaintiffs would be compelled to submit to being deprived of the use of water on their premises until by such legal proceedings as they might institute for that purpose, they could legally establish the fact that the charge was excessive. Their only alternative was to pay what was demanded of them. We think that such a case falls within the class in respect to which it may be said that the payment is virtually compulsory, and not voluntary, in the sense that the party is concluded by it. What was said upon the law of duress in the recent decision in Joannin v. Ogilvie, 49 Minn. 564, renders unnecessary any more full discussion of the subject.

Order affirmed.[1]

[1] Accord, Westlake v. City of St. Louis, 77 Mo. 47 (1882); St. Louis Brewing Asso. v. City of St. Louis, 37 S. W. (Mo.) 525 (1896). Buckley v. Mayor, 30 App. Div. (N. Y. Supreme Ct.) 463 (1898).

In Guetzkow v. Breese, 96 Wis. 591, 597 (1897), the court says: "We entertain no doubt that under the facts found by the circuit court there was a case of duress of goods. The case was this: The plaintiff could not obtain the insurance money due it unless the defendants joined in executing the proofs of loss and in endorsing the drafts. The defendants refused to do these things unless the plaintiff would pay them $666.74, which it did not owe. The plaintiff was in a position where it must obtain its insurance money at once in order to go on with its business and fulfill valuable outstanding contracts, or it would suffer great loss. Under these circumstances it submitted, under protest, to the unjust demand in order to obtain its own money from the insurance company. This makes a case of legal duress of goods. Vyne v. Glenn, 41 Mich. 112; Corkle v. Maxwell, 3 Blatchf. 413; Scholey v. Mumford, 60 N. Y. 498; Cobb v. Charter, 32 Conn. 358."

In Carew v. Rutherford and others, 106 Mass. 1 (1870), which was a contract action, with a count also in tort, to recover back money had and received, the court says (p. 13): "Without undertaking to lay down a precise rule applicable to all cases, we think it clear that the principle which is established by all the authorities cited above, whether they are actions of tort for disturbing a man in the exercise of his rights and privileges, or to recover back money tortiously obtained, extends to a case like the present. We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his busi-

REGAN v. BALDWIN.

126 MASS. 485.—1879.

CONTRACT. The declaration alleged that the plaintiff and defendant executed an indenture, whereby the defendant leased to the plaintiff the lower floor of a building in Essex Street in Boston, and the cellar under the same, for the term of ten years from October 1, 1867; that by the terms of the lease, a copy of which was annexed, the plaintiff was to pay the defendant a certain rent monthly, "except only in case of fire or other casualties," and to keep the premises in repair, "reasonable use and wear, and damage by accidental fire or other inevitable accidents only excepted;" that the lease also contained the following clause: "Provided always, that in case the premises, or any part thereof, shall, during said term, be destroyed or damaged by fire, or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinafter reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall be thereby determined and ended at the election of said lessor or his legal representatives."

The declaration further alleged that the building on the premises was burned and injured by fire on May 30, 1873, and the store and cellar, leased to the plaintiff, rendered unfit for use and habitation; that the cellar was not put, by the lessor, in suitable condition and repair for occupancy, use and habitation for the space of one year and longer; and the defendant, though often requested, refused to do so; that the lease was not determined and ended by the defendant, or by any other person having authority to do so; that the plaintiff had kept the covenants and agreements on his part to be kept and performed, and that the defendant had not kept and performed his part of said indenture; that the defendant refused to abate and suspend said rent, or a just and proportionate part thereof, but exacted of, and the plaintiff had been obliged by the defendant to pay, the rent in full, as reserved in said indenture, which the plaintiff did under protest, in order to save his estate and business.

The defendant demurred to the declaration, assigning as cause of demurrer that the matters therein set forth were insufficient to enable the plaintiff to maintain the action. The Superior Court sustained

ness without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that the money thus obtained may be recovered back, and, if the parties succeed in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated."

the demurrer, and ordered judgment for the defendant; and the plaintiff appealed.

LORD, J.—In this case the demurrer was properly sustained. The plaintiff's declaration sets forth no cause of action which entitles him to recover. The amount which he seeks to reclaim was a sum which he voluntarily paid; he paid it under no mistake of fact, and it has long been held that money so paid cannot be recovered back. * * * * The fact that the plaintiff in this case might have been under embarrassment as to the amount of rent which he should withhold, or which he might properly claim to rebate, does not affect the principle. It was his right to litigate that question with his lessor, and his election to pay the full amount rather than to resist the payment of any portion of it makes the payment a voluntary one. It is not necessary to consider whether the plaintiff would have been entitled to a cross action had the lease contained an express covenant to keep the premises in repair, for the lease contains no such covenant, and the law raises no implied promise to do so. The lease is in the form long used in this Commonwealth, which requires the lessee himself to keep the premises in such repair as he receives them (reasonable use and wear, and damage by accidental fire or other inevitable accident only excepted), with the right, commonly reserved in such leases, to have deducted from the rent a reasonable amount, if he is deprived of the use of the premises by such casualty. Judgment affirmed.

ATKINSON v. DENBY.

6 HURL. & NORM. (EXCH.) 778.—1861.

ACTION for money had and received. Plea.—Never indebted. At the trial, before Martin, B., at the Middlesex sittings, in Michaelmas Term, 1860, it appeared that the action was brought to recover 50*l.*, paid by the plaintiff to the defendant under the following circumstances. In October, 1857, the plaintiff, a manufacturer, being in embarrassed circumstances, offered a composition to his creditors of 5s. in the pound, and a deed of composition was prepared for the purpose of carrying out the offer. The defendant, a creditor for 319*l.*, refused to accept that offer or to sign the deed of composition, saying he never would consent to do so unless he got something more. On the 13th of October the defendant and the plaintiff met at the office of the plaintiff's attorney, when the plaintiff and defendant went into a private room. The defendant pressed the plaintiff to give him 150*l.* in cash in addition to the 5s. in the pound, but eventually he agreed to take a bill at six months for 108*l.* and 50*l.* in cash. The defendant knew that several creditors were then waiting to see what he would do. The plaintiff gave the defendant 50*l.* and a bill for 108*l.* The defendant then signed the deed. Five

creditors had previously executed it, and twenty signed subsequently to the signature of the defendant. The composition was paid. The plaintiff was non-suited, leave being reserved to him to move to enter a verdict for 50*l.*

BRAMWELL, B.—I am of opinion that the rule ought to be absolute. Nothing can be more dishonest on the part of a creditor than to pretend to take a composition of 5s. in the pound, and then agree privately with the debtor for payment of a larger sum and so get more than the other creditors. It may be that I am influenced by that consideration; but if it were not for the opinion entertained by my brother Martin, I should have thought the law plain. I agree that if a man voluntarily pays money which he was not bound to pay, as a general rule he cannot recover it back. So, if a man voluntarily pays a bill of exchange which he was not bound to pay, he cannot say, "I ought not to have done so, and I will now recover back the amount." I admit also, that if a man, upon a corrupt bargain, pays money or gives a bill of exchange, he cannot recover it back. But upon this general rule there has been engrafted what has been called judge-made law, but which I think is most salutary law. The qualification is this, that where, though the act is voluntary in one sense, the person for whom it is done has a species of power over the other, so that the latter does the act under coercion, there, though the contract is unlawful, it is not a case of *par delictum,* because it is a case of oppressor and oppressed. That is the qualification of the general rule, and in such cases, though the payment of the money is in a certain sense voluntary, it may be recovered back. If that is not true, Smith v. Bromley, 2 Doug. 695, n., and Smith v. Cuff, 6 M. & Sel. 160, were wrongly decided, because there the act was in one sense voluntary and the agreement illegal. But those cases having been so decided, I think we are bound by them.

Then, as a general rule, a voluntary act cannot be undone, an unlawful agreement cannot be enforced; but the cases to which I have referred have established the qualification I have mentioned. Here, though in one sense the payment was voluntary and the agreement illegal, it was a payment under coercion, and the parties were not in *pari delicto* because there was an oppressor and an oppressed. At one time I doubted whether the payment ought not to be considered voluntary, not in the sense that the plaintiff was not bound to make it, but that at the time he paid the money he did not get the benefit of his bargain. The evidence, however, showed that the whole transaction was *uno flatu,* and whether the advantage to be got by the payment occurred at the time it was made or a week afterwards seems to me to make no difference. If, indeed, the plaintiff had voluntarily paid the money after the composition was entered into, the case would not have been within the qualification I have mentioned, and Wilson v. Ray, 10 A. & E. 82 (E. C. L. R. vol. 37), is an authority that the money could not have been recovered back. With great deference to Lord WENSLEYDALE, and the doubt he expressed in Higgins v. Pitt, 4 Exch. 325, as to the soundness of the

dictum of Lord ELLENBOROUGH and BAYLEY, J., in Smith v. Cuff, 6 M. & Sel. 160, I think that case was rightly decided. In my opinion it cannot alter the principle whether a bill is given which the debtor is obliged to pay to a bona fide holder, after the execution by the creditor of the composition deed, or whether the money is previously paid by the debtor to the creditor. It makes no difference that in the one case the form of action would be for money paid, in the other for money had and received. At first I doubted whether this was not a voluntary payment, but I should be reluctant to hold that the debtor is bound to say, after the creditor has executed the deed of composition, "I will not give you what you ask;" it would introduce dishonesty. I would rather a debtor should perform his bargain then and recover back the money. Smith v. Bromley, 2 Doug. 695, n., is an authority that this is not a voluntary payment in the sense that the plaintiff need not have been paid the money. It was a payment for the purpose of obtaining an advantage which the defendant withheld, and which he extortionately granted. If this view is wrong no action could have been maintained in Smith v. Bromley, 2 Doug. 695, n., and Smith v. Cuff, 6 M. & Sel. 160.

Rule absolute.

[Concurring opinions by POLLOCK, C. B., and WILDE, B.; dissenting opinion by MARTIN, B.]

SOLINGER v. EARLE.

82 N. Y. 393.—1880.

ANDREWS, J.—The complaint alleges in substance that the plaintiff, to induce the defendants to unite with the other creditors of Newman & Bernhard in a composition of the debts of that firm, made a secret bargain with them to give them his negotiable note for a portion of their debt, beyond the amount to be paid by the composition agreement. He gave his note pursuant to the bargain, and thereupon the defendants signed the composition. The defendants transferred the note before due to a *bona fide* holder, and the plaintiff having been compelled to pay it brings this action to recover the money paid. The complaint also alleges that the plaintiff was the brother-in-law of Newman, and entertained for him a natural love and affection, and was solicitous to aid him in effecting the compromise, and that the defendants knowing the facts, and taking an unfair advantage of their position, extorted the giving of the note as a condition of their becoming parties to the composition.

We think this action cannot be maintained. The agreement between the plaintiff and the defendants to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition, was a fraud upon the other creditors. The fact that the agreement to pay such excess was not made by the

debtor, but by a third person, does not divest the transaction of its fraudulent character.

A composition agreement is an agreement as well between the creditors themselves, as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principle of equity, and the mutual confidence as between creditors, upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement, to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction. If the defendants here were plaintiffs seeking to enforce the note, it is clear that they could not recover. Cockshott v. Bennett, 2 Term R. 763; Leicester v. Rose, 4 East 372. The illegality of the consideration upon well-settled principles would be a good defense. The plaintiff, although he was cognizant of the fraud, and an active participator in it, would nevertheless be allowed to allege the fraud to defeat the action, not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts, on the application of a party to the illegality. But if he had voluntarily paid the note, he could not, according to the general principle applicable to executed contracts void for illegality, have maintained an action to recover back the money paid. The same rule which would protect him in an action to enforce the note, protects the defendants in resisting an action to recover back the money paid upon it. Nellis v. Clark, 4 Hill 429.

It is claimed that the general rule that a party to an illegal contract cannot recover back money paid upon it does not apply to the case of money paid by a debtor, or in his behalf, in pursuance of a secret agreement, exacted by a creditor in fraud of the composition, and the cases of Smith v. Bromley (2 Doug. 696), Smith v. Cuff (6 M. & S. 160), and Atkinson v. Denby (7 H. & N. 934) are relied upon to sustain this claim. In Smith v. Bromley the defendant, being the chief creditor of a bankrupf, took out a commission against him, but afterward finding no dividend likely to be made, refused to sign the certificate unless he was paid part of his debt, and the plaintiff, who was the bankrupt's sister, having paid the sum exacted, brought her action to recover back the money paid, and the action was sustained. Lord MANSFIELD, in his judgment, referred to the statute (5 Geo. II, chap. 30, sec. 11), which avoids all contracts made to induce a creditor to sign the certificate of the bankrupt, and said: "The present is a case of a transgression of a law made to prevent oppression, either on the bankrupt or his family,

and the plaintiff is in the case of a person oppressed, from whom money has been extorted and advantage taken of her situation and concern for her brother." And again: "If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage and torturing the compassion of his family." In Howson v. Hancock (8 Term R. 575) Lord KENYON said that Smith v. Bromley was decided on the ground that the money had been paid by a species of duress and oppression, and the parties were not in *pari delicto,* and this remark is fully sustained by reference to Lord MANSFIELD's judgment. Smith v. Cuff was an action brought to recover money paid by the plaintiff to take up his note given to the defendant, for the balance of a debt owing by the plaintiff, which was exacted by the latter as a condition of his signing with the other creditors a composition. The defendant negotiated the note and the plaintiff was compelled to pay it. The plaintiff recovered. Lord ELLENBOROUGH said: "This is not a case of *par delictum;* it is oppression on the one side and submission on the other; it never can be predicated as *par delictum* where one holds the rod and the other bows to it." Atkinson v. Denby was the case of money paid directly by the debtor to the creditor. The action was sustained on the authority of Smith v. Bromley and Smith v. Cuff.

It is somewhat difficult to understand how a debtor who simply pays his debt in full can be considered the victim of oppression or extortion because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not in *pari delicto.* (See remark of PARKE, B., in Higgins v. Pitt, 4 Exch. 312.) But the cases referred to go no farther than to hold that the debtor himself, or a near relative who out of compassion for him pays money upon the exaction of the creditor, as a condition of his signing a composition, may be regarded as having paid under duress and as not equally criminal with the creditor.

These decisions cannot be upheld on the ground simply that such payment is against public policy. Doubtless the rule declared in these cases tends to discourage fraudulent transactions of this kind, but this is no legal ground for allowing one wrongdoer to recover back money paid to another in pursuance of an agreement, illegal as against public policy. It was conceded by Lord MANSFIELD, in Smith v. Bromley, that when both parties are equally criminal against the general laws of public policy, the rule is *potior est conditio defendentis,* and Lord KENYON, in Howson v. Hancock, said that there is no case where money has been actually paid by one of two parties to the other upon an illegal contract, both being *particeps criminis,* an action has been maintained to recover it back.

It is laid down in Cro. Jac. 187, that "a man shall not avoid his deed by duress of a stranger, for it hath been held that none shall avoid his own bond for the imprisonment or danger of any one than himself only." And in Robinson v. Gould (11 Cush. 57) the rule was applied where a surety sought to plead his own coercion as

growing out of the fact that his principal was suffering illegal imprisonment as a defense to an action brought upon the obligation of the surety given to secure his principal's release. But the rule in Cro. Jac. has been modified so as to allow a father to plead the duress of a child, or a husband the duress of his wife, or a child the duress of the parent. Wayne v. Sands, 1 Freeman 351; Bayley v. Clare, 2 Browne 276; 1 Roll. Abr. 687; Jacob's Law Dic., *"Duress."*

We see no ground upon which it can be held that the plaintiff in this case was not in *par delictum* in the transaction with the defendants. So far as the complaint shows he was a volunteer in entering into the fraudulent agreement. It is not even alleged that he acted at the request of the debtor. And in respect to the claim of duress, upon which Smith v. Bromley was decided, we are of opinion that the doctrine of that and the subsequent cases referred to can only be asserted in behalf of the debtor himself, or of a wife or husband, or near relative of the blood of the debtor, who intervenes in his behalf, and that a person in the situation of the plaintiff, remotely related by marriage, with the debtor, who pays money to a creditor to induce him to sign a composition, cannot be deemed to have paid under duress by reason simply of that relationship, or of the interest which he might naturally take in his relative's affairs.

The plaintiff cannot complain because the defendants negotiated the note, so as to shut out the defense which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given, as the words of negotiability show. It is possible that the plaintiff, while the note was held by the defendants, might have maintained an action to restrain the transfer, and to compel its cancellation. Jackson v. Mitchell, 13 Ves. 581. But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although under the coercion resulting from the transfer, the law leaves him where the transaction has left him.

The judgment should be affirmed.

All concur. Judgment affirmed.

---

iii. *Non-performance of a Public Duty.*

1. PUBLIC OFFICERS.

LOVELL v. SIMPSON.

3 Esp. 153.—1800.

This was an action of debt under the statute 32 Geo. II, ch. 28, brought by the plaintiff to recover from the defendant, who was a sheriff's officer, the amount of several penalties given by that statute, for taking more money on an arrest than is allowed by that act.

The plaintiff gave in evidence, that having been arrested by the defendant, on a writ marked for bail for 500*l*, he gave bail to the sheriff; that the defendant charged five guineas for the bail bond and civility money; and that two guineas and a half were actually paid. By the stat. 32 Geo. II. ch. 28, the officer is allowed to take the sum of half a guinea for the bail bond, and no more. The declaration contained the common money counts in debt, for money had and received, and money paid, as well as the counts for the penalties. The plaintiff having omitted to subpœna the witness to the bail bond, and the extortion being laid to have been committed in taking the money for the bail bond, in all the counts for the penalties, the plaintiff was under the necessity of abandoning those counts. His counsel then proposed to go on the count for money had and received.

Mingay, for the defendant, contended that the plaintiff should be non-suited, and not be permitted to go into evidence on the money counts. That the action having been brought for the penalties for the breach of a statute, and the plaintiff having failed in establishing the offense, should not be allowed to go for the money taken by the officer, in the form of money had and received; inasmuch as the money, if improperly or illegally taken, subjected him to the penalties which the plaintiff had failed in establishing.

Lord KENYON ruled, that the plaintiff might recover on the money counts; that it was money extorted from the plaintiff by the defendant taking an advantage of his situation, and under a claim of right, which the plaintiff was unable to resist. That the claim arose under a settled rule of law, which entitled a party to recover back money extorted from him, which was the case here; and the circumstance of the defendant's thereby incurring a penalty could not vary it.

Verdict for the plaintiff for the money paid, deducting the sum allowed by law to the defendant.[1]

[1] Accord, Swift Co. v. United States, 111 U. S. 22 (1884), in which the court says (p. 30): "If a person illegally claims a fee *colore officii*, the payment is not voluntary so as to preclude the party from recovering it back. Morgan v. Palmer, 2 B. & C. 729. In Steele v. Williams, 8 Exch. 625, Martin, B., said: 'If a statute prescribes certain fees for certain services, and a party assuming to act under it insists upon having more, the payment cannot be said to be voluntary.' 'The common principle,' says Mr. Pollock, Principles of Contract 523, 'is, that if a man chooses to give away his money, or take his chances whether he is giving it away or not, he cannot afterward change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice.' Addison on Contracts 1043; Alton v. Durant, 2 Strobh. 257."

And see also American Steamship Co. v. Young, 89 Pa. 186 (1879), in which the court says (p. 191): "We think that sound public policy requires us to hold that a public officer who, *virtute officii*, demands and takes as fees for his services what is not authorized or more than is allowed by law, should be compelled to make restitution. He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services; but with them it is different. They have neither the time nor the opportunity of acquiring the information neces-

BRUMAGIM ET AL. v. TILLINGHAST.

18 CAL. 265.—1861.

DEFENDANT filed a general demurrer, which the court below sustained, and gave final judgment in his favor. Plaintiffs appeal.

FIELD, C. J. delivered the opinion of the court; BALDWIN, J., and COPE, J., concurring.—The Act of Legislature of April, 1858, amendatory of the Act of April, 1857, "to provide revenue for the support of the government of this State, from a tax to be levied and collected from foreign and inland bills, and other matters," imposes upon bills of lading for the transportation of gold or silver coin, gold dust, or gold or silver in bars, or other form, from any point or place in this State to any point or place without the State, a stamp tax of thirty cents on the first one hundred dollars of the value of the property transported, and of one-fifth of one per cent. upon the amount of its valuation exceeding that sum, and requires that there shall be attached to each bill of lading, or stamped thereon, a stamp or stamps expressing in value the amount of such tax. The original Act of 1857 constitutes the governor, treasurer, and secretary of state, commissioners of stamp duties, and, in substance, provides that they shall cause stamped paper or stamps corresponding with the several rates of duties prescribed by the act, to be prepared and delivered to the controller, to be by him distributed to the several county treasurers for sale. The original act also declares all contracts or instruments of writing executed after the first of July, 1857, charged with the payment of a stamp tax, absolutely void unless stamped or marked as prescribed therein, and makes the issuance of any such instruments without the stamp a misdemeanor punishable by fine. The plaintiffs are bankers, engaged in the regular course of their business in shipping gold and silver coin, gold and silver in bars, and gold dust from the port of San Francisco, in this State, to the port of New York, in the State of New York, and to foreign ports; and the present action is brought to recover $2,031, alleged to have been paid by them to the defendant, who was treasurer of the city and county of San Francisco, in the purchase of stamps to be affixed to bills of lading taken upon shipments made by them from the port of San Francisco to the port of New York.

Two questions are presented for determination by the demurrer: 1st, Whether the Act of 1858, referred to, so far as it imposes a stamp tax upon the bills of lading mentioned, is in conflict with the Constitution of the United States; and 2d, If the act is held to be in

sary to enable them to know whether he is claiming too much or not; and, as a general rule, relying on his honesty and integrity, they acquiesce in his demands." And see also, in accord, Ripley v. Gelston, 9 Johns. (N. Y.) 201 (1812); Clinton v. Strong, 9 Johns. (N. Y.) 370 (1812).

conflict with the Constitution of the United States, whether upon the facts stated in the complaint, the plaintiffs are entitled to recover from the defendant the amounts paid by them.

1. Upon the first question presented we have the decision of the Supreme Court of the United States, rendered since the appeal in the present case has been pending. In Almy v. The People of the State of California, decided at the December term,[1] the constitutionality of the act of this State was considered—indeed, constituted the sole question before that Court. * * * *

This decision of the Supreme Court is conclusive upon us, and we therefore hold in accordance with it, that the Act of April, 1858, so far as it imposes a tax upon bills of lading for the transportation of gold and silver from any point in this State to any point without the State, is unconstitutional and void. And, as a matter of course, the provisions of the original Act of 1857 for the enforcement of the stamp tax, must be restricted in their application to other instruments than such bills of lading.

2. The solution of the second question presented depends upon the character of the payments—whether they were voluntary, or made under compulsion or coercion. Notwithstanding some doubts suggested in the early cases on the subject, the rule is at this day well settled that moneys voluntarily paid upon a claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes of itself no ground for relief. There must be in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment. * * * *

What shall constitute the compulsion or coercion which the law will recognize as sufficient to render payments involuntary may often be a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money. In Forbes v. Appleton, 5 Cush. 117, a payment of money was made in order to prevent the obligee in a bottomry bond from attempting to enforce the same by taking possession of the vessel, and the court held that it was not a compulsory but a voluntary payment, and if the money was not due, the debtor had no right of action to recover it back, although he declared at the time of payment that he made it under coercion, and intended to reclaim the same by action. "The principle of law," said the court, "is a very familiar and salutary one, that, where a person with full knowledge of all the circumstances, paid money voluntarily under a claim of right, he shall not afterwards recover back the money so paid. To avoid the application of the rule in the

[1] 24 How. (U. S.) 169.

present case, it must appear that the plaintiff was compelled, by duress of his person or goods, to pay the same. In general, the cases that have been treated as exceptions are cases where the possession of the property upon which the lien was claimed was already in the party demanding the money, or cases in which the party had no other means to save himself from imprisonment, or his property from sale, on execution or warrant of distress, but by paying the money demanded." In the case of Mayor and City Council of Baltimore v. Lefferman, 4 Gill 425, the Court of Appeals of Maryland concludes an examination of numerous authorities on the subject of compulsory payments, by stating that it considers "the doctrine as established, that a payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress, imposed upon it *by the party to whom the money is paid.*" And in Mays v. Cincinnati, 1 Ohio Rep. 268, the Supreme Court of Ohio concludes a like examination by observing, that "this unbroken chain of authority seems to warrant the conclusion that a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it."

Tested by these authorities, the question presented is one of easy solution. The complaint does not show that the payments to the defendant for the stamps were the result of any coercion on his part. It only alleges that in the ordinary course of trade, shipments of gold and silver to New York were made by lines of ocean steamers plying between San Francisco and Panama, and connecting with lines of steamers plying between Aspinwall and New York; that they afforded the only safe and speedy means by which such shipments could be made; that the owners, agents, and masters of these lines refused to issue bills of lading, unless the same were first stamped, in pursuance of the act of 1858; that in order to procure bills of lading for shipments made by them, the plaintiffs were forced to apply to the defendant, as county treasurer, for the purchase of the requisite stamps to be affixed to the bills, and did purchase the same from him at the prices designated in the Act, which he demanded; that they protested at the time against the right of the defendant to exact payment for the stamps, and against the acts of the Legislature as unconstitutional and void, and gave notice that they would hold him responsible for the moneys paid. No facts are here stated showing any compulsion or coercion by the defendant. The only compulsion or coercion, in fact, alleged, comes from another source—from the masters, agents, and owners of the steamers, from their refusal to issue bills of lading unless previously stamped. But this conduct of third parties cannot be resorted to for the purpose of fastening liability upon the defendant. Unless he has personally done some act which the law condemns, he cannot be charged, no

matter how arbitrarily or improperly others may have acted. Suppose the owners or agents of the steamers had refused to issue the bills of lading required until the plaintiffs made purchases of other articles than stamps, or bestowed certain bounties, and they had complied with these conditions, no one would pretend that an action could subsequently be maintained by the plaintiffs against the vendors in the one case, or the recipients of the bounties in the other, to recover back the money with which they had parted. But the case supposed and the case at bar are not materially different. The refusal to issue the bills of lading might as well have been placed on the one ground as the other. The existence of the Act of 1858, it is true, induced the conduct of the agents and owners of the steamers, but the justification of their conduct falls with the constitutionality of the act. That conduct, as we have observed, could not affect the action of the defendant. He was entrusted with a certain quantity of stamps, and authorized to dispose of them to applicants at a fixed price. If the price were paid, he delivered the stamps, but if not paid, he retained them in his possession. The plaintiffs were at liberty, so far as he was concerned, to purchase or decline purchasing. He was not invested with power to compel them to purchase, nor to punish them if they chose to refrain from purchasing. Nor was he in possession of any of their property, the delivery of which they could not obtain without such payment. Under these circumstances, the payments made by them were in the eye of the law, voluntary payments. They were acquainted with all the facts, and the case was not one which admitted of false representations as to the position or power of the defendant. The gist of the whole matter, as alleged by the plaintiffs, is simply this: They doubted as to the constitutionality of the Act of the Legislature, and therefore voluntarily purchased the stamps, preferring this course, as one of convenience, to taking proceedings against the owners or agents of the vessels who refused the bills of lading unless stamped. The protest accompanying the purchase and payment of the money did not change the character of the transaction. A protest is available, as we said in McMillan v. Richards, 9 Cal. 417, only in cases of payment under duress or coercion, or where undue advantage is taken of one's situation. In such cases its object is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. But where no such compulsion exists, or advantage is taken, there is no case for its interposition, and the character of the payment is unaffected by it. Fleetwood v. The City of New York, 4 Sandf. 476. If the payment were in truth voluntary, no language used on the occasion would change its character.

Judgment affirmed.

NIEDERMEYER v. CURATORS OF THE UNIVERSITY OF MISSOURI.

61 Mo. App. 654.—1895.

SMITH, P. J.—The catalogue of the University of the State for the years 1891 and 1892 contained the following paragraph, amongst others:

"TUITION CHARGES AND EXPENSES.—Applicants for admission to any of the classes of the law department, or as special students of elective courses, are required to pay the sum of fifty dollars for the first year's attendance and forty dollars for each successive year.

"(Signed) ALEXANDER MARTIN,
"Dean, Columbia, Mo."

It appears that the plaintiff examined the said catalogue, including the above quoted paragraph, after which he concluded to enter the University with the view of availing himself of the entire course of legal study there specified. Accordingly, in October, 1892, he paid the treasurer of the University the sum of $50 and was admitted to the junior class of the law department for the year ending June, 1893.

In September, 1893, the plaintiff, desiring admission to the senior class of said law department for the session ending June, 1894, offered to pay said treasurer $40 tuition for that year, which offer was rejected, and finding that the sole condition of admission was the prepayment of a tuition fee of $50, he paid that amount under protest, and was thereupon given a matriculation card. In the catalogue of 1893 and 1894 is a paragraph to the effect that law students are required to pay $50 tuition per year. On substantially the foregoing state of facts, the plaintiff brought this suit before a justice of the peace to recover $10 for "excessive tuition collected for law department, 1893 and 1894." There was a trial in the court below, where the cause was removed by appeal, which resulted in judgment for the defendant, from which plaintiff has appealed.

The paragraph in the catalogue of 1892 and 1893 was by its very terms a public offer to admit persons as students to any of the classes of the law department of the University, on payment of $50 for the first year and $40 for each successive year. The plaintiff's payment of $50 and receipt of his matriculation card for the years 1892 and 1893 constituted an implied acceptance and also notice of such acceptance. The contractual relations created between the parties thus became complete and binding. Society v. Broomfield, 102 Ind. 146; Bishop on Contracts, sec. 322; Wharton on Contracts, sec. 241; Lovejoy v. Railroad, 53 Mo. App. 386.

Did the acceptance by plaintiff of the defendant's offer constitute an entire contract? To determine this requires a construction of the contract, and in doing so we must not only consider the language employed and the subject matter, but view them in the light of the

circumstances, to ascertain what the parties actually understood or intended. 2 Parsons on Contracts (7 ed.) 517. It is manifest that the purpose of the defendants was to secure the attendance of students who would complete the entire course by offering them as an inducement a reduction of the tuition for the successive years which would be required to complete the entire course. The undisputed evidence shows that the plaintiff entered for the purpose of taking, and did take, the entire course. In view of the language of the offer and the facts just stated, we think that the contract between the parties was an entirety.

If, as suggested by the plaintiff, it should be contended the offer and acceptance is a contract for the first year, with an option to take the second year by paying $40, then it is binding on defendants, as the plaintiff not only appeared and demanded the right to enter under the option, before the term expired, but paid a valuable consideration for the option, which could not be withdrawn. Bishop on Contracts (ed. 1887), section 325; Tiedeman on Sales, section 41; Cherry v. Cook, 7 Wis. 413.

But, suppose it be conceded that under the contract existing between plaintiff and defendants, the former was entitled to admission to the senior class of law department, for the term ending in June, 1894, on payment of a tuition fee of $40; and suppose, too, it be further conceded that the defendants, by their treasurer, demanded of the plaintiff the payment of the tuition of $50 for said year, as a condition precedent to his admission, and that plaintiff paid the excess above $40 under protest, yet can he recover back such excess in an action of *assumpsit* for money had and received?

[*Then follows a review or citation of the following cases: Brisbane v. Dacres,* 5 Taunt. 143; *Buchanan v. Sahlein,* 9 Mo. App. 563; *Boston v. Boston,* 4 Metc. 181; *Wolff v. Marshall,* 52 Mo. 171; *Maguire v. Savings Ass'n,* 62 Mo. 344; *Westlake v. St. Louis,* 77 Mo. 47; *Warrensburg v. Miller,* 77 Mo. 56; *Loring v. St. Louis,* 80 Mo. 461.]

Although in the present case the payment of the excess was not made to preserve the inviolability of the person, or to redeem property illegally held, or to prevent its unlawful seizure, yet it was made to secure admission. It was paid to remove what was otherwise an insurmountable barrier to the completion of plaintiff's legal education in the University of his state; to avoid being compelled to go abroad to seek university advantages, amply provided by his own state for all its citizens; to enable plaintiff to gain admission to the senior class of the law department and thus speedily obtain his degree; and to prevent an interference and break in the course of his legal education, and the loss of money expended in reaching the University and providing textbooks, etc. The plaintiff and defendants were not on equal terms. The defendants possessed, and in effect threatened to exercise, the power of excluding the plaintiff unless the illegal demand of their treasurer met with compliance.

Under these circumstances, can it be said the payment was voluntary? Was it not under moral duress? Was not the plaintiff under as much compulsion as if the defendants had been armed with a warrant for the arrest of plaintiff or the seizure of his goods? If the fear of seizure of goods, as in 62 Mo., *supra,* would make the payment of the extorsive excess, if made under objection, compulsive and involuntary, it would seem that a payment made to prevent the incalculable injury already indicated must be regarded in the same light. According to some of the authorities within and without this state, from which we have quoted, the plaintiff's action cannot be maintained; but according to the most recent rulings of the supreme court just referred to, it would appear that it can.

After the proposition contained in the catalogue of 1892 and 1893 had been accepted by plaintiff, and the rights of the plaintiff had thereby become fixed, it was not within the power of the defendants to alter or abridge those rights by withdrawing the proposition and publishing that contained in the catalogue of 1893 and 1894. And whether plaintiff had notice of that fact before he applied for admission to the second year's course or not, it seems to us, can make no difference. The proposition contained in the catalogue of 1892 and 1893 was that of the state, and, when accepted, good faith and fair dealing required that it should be carried out on the part of the state to the letter. An enlightened and progressive state can ill afford to trifle with the rights of the citizen in the slightest degree. The court erred in rejecting the theory contained in the plaintiff's instructions and in adopting that contained in those of the defendants.

The judgment must be reversed and cause remanded, with directions to the circuit court to enter judgment for the plaintiff. All concur.

---

2. COMMON CARRIERS AND PUBLIC SERVICE CORPORATIONS.

KENNETH & GIBSON v. SOUTH CAROLINA R. R.

15 Rich. L. (S. C.) 284—1868.

On motion to set aside order of nonsuit. Motion dismissed.

Inglis, A. J.—The plaintiffs, Kenneth & Gibson, are merchants of Columbia, engaged, *inter alia,* in buying cotton there and selling the same, by their agents, in Charleston, or sending it through that port for sale abroad. During the period of about fifteen months, extending from 1st July, 1865, to 1st October, 1866, they forwarded by defendant's road, in various parcels, from time to time, to different consignees, in all, nineteen hundred and thirty-seven bales of cotton. The defendant's charges for transportation were, in every instance, paid by the consignee in Charleston, after the delivery of

the cotton and without objection. The rates of charges varied from two dollars to five dollars per bale, at different dates during the whole period, and the aggregate sum paid was about eight thousand five hundred dollars ($8,500). The plaintiffs allege that the rates of charges for transportation, which they have thus paid, exceed those which the defendant is, by law, permitted to exact, by a large sum, perhaps some four thousand dollars or more in the aggregate, and in this action of assumpsit for *money had and received* by the defendant for the use of the plaintiffs they seek to recover back this excess. * * * *

In the present case the objectionable charges were not exacted until after the service in each instance had been fully rendered, and the plaintiff was, for the particular transaction, out of the power of the defendant. An easy mode of insuring the protection designed by the statute was, after tendering the amount that might be lawfully demanded, and refusing more, to stand an action if the company had chosen to bring one. The defendant's act of demanding and taking more than the maximum of charges prescribed by the statute is illegal only in this, that the company therein exceeded their rightful power and required that which they had no authority by law to exact. And the case is brought back within the operation of the general doctrine. If the defendant, by withholding from any one his property or right, wring from his reluctant and protesting will money to which the company has no lawful right, it cannot, *ex aequo et bono,* be retained, but may be recovered back in this form of action. But if one, with full knowledge of all material facts *voluntarily* pays that which could not be lawfully demanded of him, he has thrown away his shield, and must abide the consequences; he cannot recover the money. He has waived the protection which the law offered him. His free and intelligent assent has made that right as between them, which would have else been wrong. *Volenti non fit injuria* * * * *[1]

MONONGAHELA NAVIGATION CO. v. WOOD ET AL.

194 PA. ST. 47.—1899.

BROWN, J.—The appellants insist that they ought to recover back excessive tolls collected from them by the appellee, and their right to do so depends upon the facts developed on the trial. It seems that for a number of years the Monongahela Navigation Company, under its corporate power to charge and receive "such rates of toll and charges as shall be just and reasonable," had adopted a schedule for coal and slack, the rate for the latter being one-half of that charged for the former. Some years ago the shippers—among them the appellants—began to ship the coal as it came from the mine, forming one mass and known as "run of mine coal," which had pre-

[1]Accord, Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535 (1908), which is severely criticised by Roscoe Pound in 3 Ill. L. Rev. 235-239. Accord also (unjustly discriminatory charges), Potomac Coal Co. v. R. R., 38 Md. 226 (1873).

viously been separated into coal and slack. Upon such shipments the Monongahela Navigation Company charged the full coal rate, and the shippers, alleging and having shown on the trial that two-fifths of the run of mine coal was slack, insisted that they ought to be charged for it one-half of the rate fixed for coal, or for the whole shipment, but four-fifths of the coal rate. A number of cases were tried together,—five in which the Monongahela Navigation Company was plaintiff, seeking to recover unpaid tolls, and two in which the shippers, as plaintiffs, sought to recover back excessive charges paid. The specifications of error involve but the single question of the right of the shippers to recover back excessive tolls collected from them, and we have reviewed all the testimony taken on the joint trial in considering and determining whether any error was committed by the learned trial judge in his instructions to the jury, which alone are assigned as error. These instructions were that the shippers could not recover back the tolls alleged to have been illegally paid, either in a suit brought by them or by way of set-off in proceedings against them. The jury found that the tolls charged were unreasonable, and, so far as they had not been paid, proper allowance was made to the shippers in each case. Ought they to recover back what they had paid? This depends upon the conditions under which the tolls or charges were paid. The appellants in every instance claimed the tolls as a matter of right. It is true that complaint was made from time to time that the charges were excessive and discriminating, and that other rates ought to be fixed. Disputes were continuous over the tolls exacted, and demands were made for modifications, but in every instance the company insisted upon its right to demand and receive what was paid, and no notice was ever given at the time of payment that the rates charged were illegal, and that they were involuntarily paid. In Peebles v. City of Pittsburgh, 101 Pa. St. 304, our Brother Green held that: "Where there is compulsion, actual, present, potential in inducing payment by force of process, available for instant seizure of person or property, and the demand is really illegal, then the party, by giving notice of the illegality and of his involuntary payment, can recover back the money so paid in an action brought for that purpose." This, in express terms, was reaffirmed in Harvey v. Bank, 119 Pa. St. 212, 13 Atl. 202. If the shippers had insisted that illegal tolls were being exacted from them, as the jury subsequently found, and that they paid the same involuntarily, under protest, for the purpose of having their coal pass through the locks, they could have recovered any excess paid. In protesting, some notice ought to have been given, formal or informal, that the amount paid would be reclaimed. We have failed to discover that in any case, either when the tolls were paid or at any other time, was notice served upon the company that the shipper would demand repayment of the excessive amount paid. As we have not been persuaded that there is any error in the instructions complained of, but, on the other

hand, after a careful review of all the testimony, feel that what was said to the jury was proper, all the assignments of error are overruled, and the judgment is affirmed.

Beck, J., in HEISERMAN et al. v. BURLINGTON, C., R. & N. RAILWAY.

63 Iowa 732, 736.—1884.

III. It will be observed that this action is not brought to recover the penalties for overcharges by the railroad companies, provided by chapter 68, Acts of the Fifteenth General Assembly, in force when the acts complained of by plaintiff were done. The plaintiffs seek to recover the sums paid by them in excess of reasonable charges, and nothing more. The liability of defendant for money collected for the transportation of property, in excess of reasonable charges, existed at common law. The enactment of a statute imposing penalties for excessive charges, recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges. See City of Dubuque v. Ill. Cen. Ry. Co., 39 Iowa 56; City of Burlington v. B. & M. Ry. Co., 41 Id. 134; Crittenden v. Wilson, 5 Cow. 165; Gooch v. Stephenson, 13 Me. 371; Candee v. Howard, 37 N. Y. 653.

The injured party may waive the tort created by statute, and sue upon the implied contract raised by law, whereby the carrier is obliged to repay the consignee or consignor of the property all sums exacted in excess of reasonable compensation. Nor need the plaintiff, in a case brought to enforce such an obligation, show objection or protest prior to the payment made in excess of a reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. If the consignor refuses to pay or contract to pay the charges fixed by the railroad company, his goods will not be carried; or, if the consignee refuses to make the payment demanded, the goods will not be delivered. In both cases great loss and even destruction of profitable business will result. If railroad companies should be held free from liability for excessive charges, the whole business of the country would be subject to unjust exactions, resulting in oppression to citizens and destruction to useful and profitable business. The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of

power to enforce obedience to their requirements. For another reason they are not required: Those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names or where to find them. Their places of business are usually in cities, distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officers, delays would follow, resulting in loss, and, in the case of the shipment of some kinds of perishable property, in its decay. These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest. This rule does not apply to cases of compulsory payments, and does not require objection and protest when they would be unavailing and vain. The doctrines we have expressed are, supported by the following authorities: Chicago & Alton Ry. Co. v. Coal Co., 79 Ill. 121; Mobile & M. Ry. Co. v. Steiner et al., 61 Ala. 559; Parker v. Great Western Ry. Co., 7 Man. & Gr. 253; Harmony v. Bingham, 12 N. Y. 99; Chandler v. Sanger et al., 114 Mass. 364; Stephan v. Daniels et al., 27 Ohio 527; Robinson v. Ezzell, 72 N. C. 231; Carew v. Rutherford et al., 106 Mass. 1; Lafayette & I. Ry. Co. v. Pattison, 41 Ind. 312; Philanthropic Building Ass. v. McKnight, 35 Pa. St. 470; Wood v. Lake, 13 Wis. 84; Wheaton v. Hibbard, 20 Johns. 290; Thomas v. Shoemaker, 6 Watts & S. 179; Palmer v. Lord, 6 Johns. Ch. 95; State Bank v. Ensminger, 7 Blackf. 105.

IV. The action, as we have shown, is not brought to recover the penalty provided by statute, which is barred by the statute of limitations in two years. Herriman v. B., C. R. & N. Ry. Co., 57 Iowa 187. Being an action to recover upon an implied contract, it is not barred until the expiration of five years.[1]

MOBILE AND MONTGOMERY RAILWAY v. STEINER, McGEHEE & CO.

61 Ala. 559.—1878.

The appellees, Steiner, McGehee & Co., brought this action against the appellant, The Mobile and Montgomery Railway Co., on the 14th day of February, 1876, to recover certain penalties which the complaint alleged the railway company had incurred, at various times, between the 21st day of April, 1875, and the first day of December of that year, by violating the provisions of the second section of "an act regulating the charges for transportation of freight

[1] Accord, Cook & Wheeler v. Chicago, R. I. & P. Ry., 81 Iowa 551 (1890).

upon railroads within this State," approved April 19, 1873. Some of the counts also sought to recover the amount of overcharges illegally exacted on freights, between the 1st day of December, 1875, and the 4th day of February, 1876.

STONE, J.—* * * * We have shown above that any demand and payment of charges for transportation of local freight, above fifty per cent. increase on the rate of the same description of freight over the whole line of the railway is excessive and illegal. It is in positive disregard and violation of the mandate of the law. It is contended for appellant, first, that inasmuch as the statute has declared the rate of tolls, and has given a penalty for its violation, this remedy is exclusive, and none other can be resorted to. Second, that the payments were voluntarily made, and therefore cannot be recovered back. We do not think there is anything in either of these objections. In regard to the first, any violation of a statute, or disregard of a statutory duty, by which another suffers pecuniary loss, gives to the injured party a right of action for the damages sustained. Satterfield, Ex'r, of Grey, v. Mobile Trade Co., 55 Ala. 387. And where the wrong consists in the unauthorized demand of money, and its payment under such unauthorized demand, this is money had and received by the defendant for the use and benefit of the payor, unless the case falls within the principle of money voluntarily paid; and a count for money had and received is sufficient for its recovery.

The second objection. Railroads have so expedited and cheapened travel and transportation; have so driven from their domain all competing modes of transportation, that the public is left no discretion but to employ them, or suffer irreparable injury in this age of steam and electricity. They have their established rates of charges, and these the shipper must pay, or forego their facilities and benefits. To object or protest would be an idle waste of words. The law looks to the substance of things, and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service, is not voluntarily paid, as the law interprets that phrase. In the case of the Chicago and Alton Railroad Co. v. the C., V. & W. Coal Co., 79 Ill. 121, the court, in reply to the objection that the money was voluntarily paid, said: "It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of life or death with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which in equity and good conscience they ought not to retain." The case of Parker v. Gr. Wes. R. R. Co., 7 Man. & Gr. 253, was a suit by a shipper to recover back excessive charges paid the railroad. It was objected that the payment was voluntary. The court, C. J. TINDAL, said: "We are of opinion that the payments were not voluntary. They were made in order to in-

duce the company to do that which they were bound to do without them; and for the refusal to do which an action on the case might have been maintained." The case was assumpsit for money had and received, and the court ruled that the action was well brought. To the same effect are the following authorities, 2 Greenl. Ev., § 121; Colwell v. Peden, 3 Watts 327; Harmony v. Bingham, 2 Ker. 99; Bos. & S. Glass Co. v. City of Boston, 4 Metc. 181; Chandler v. Sanger, 144 Mass. 364; Stephen v. Daniels, 27 Ohio St. 527; Tuttle v. Everett, 51 Miss. 27; Howe v. State, 53 Miss. 57; Robinson v. Ezzell, 72 N. C. 231; First National Bank v. Watkins, 21 Mich. 483; Atwell v. Zeluff, 26 Mich. 118; McKee v. Campbell, 27 Mich. 497; Carew v. Rutherford, 106 Mass. 1; L. & I. Railroad Co. v. Pattison, 47 Ind. 311.

The case of Potomac Coal Co. v. C. & P. Railroad Co., 38 Md. 226, is not in harmony with the above, but we decline to follow it.[1]

* * * *

[1]Accord (unjustly discriminatory charges), Louisville, E. & St. L. R. R. v. Wilson, 132 Ind. 517 (1892); (recovery because payment was under mistake of fact of discrimination) Pingree v. Gas Co., 107 Mich. 156 (1895); Armour Packing Co. v. Edison Co., 115 N. Y. App. Div. 51 (1906).

iv. *Usurious Interest.*

PHILANTHROPIC BUILDING ASSOCIATION v. McKNIGHT.

35 PA. ST. 470.—1860.

THIS was an action of assumpsit by William McKnight against the Philanthropic Savings, Loan and Building Association, to recover back a sum of money paid to the defendants on an usurious contract. On the 23d of June, 1854, the plaintiff, who was the holder of five shares of the stock in the Philanthropic Savings, Loan and Building Association, was the successful bidder for a loan of $1,000 at a premium of 28 per cent. He accordingly received from the defendants the sum of $720, executed to them a bond and mortgage in the sum of $1,800, and transferred his five shares of stock as collateral security. On the 9th of August, 1858, the plaintiff notified the defendants of his desire to pay off his loan and discharge the mortgage. A settlement was accordingly had between the parties, in which the mortgage was estimated at $900, and the defendants agreed to take the plaintiff's stock at the sum he had paid in on account of it; the balance, amounting to $574.07, the plaintiff paid in cash, and satisfaction was entered on his mortgage. This suit was subsequently brought to recover back the difference between the sum of $720 with legal interest, and the amount actually paid to the defendants.

STRONG, J.—That the payment of usurious interest is not a voluntary payment in any such sense as to entitle the receiver to retain the sum paid above legal interest is too well settled to admit of doubt. The money is paid under the constraint of a formal though illegal contract. That contract itself was obtained by oppression, by taking advantage of the necessities of the borrower, and, of consequence, so was the usurious interest paid under it. The early disposition of the English courts was to deny the right of a party paying such interest to recover back any portion of the money paid, for the reasons that both parties to such a transaction were deemed to be "*in pari delicto,*" and the excess of interest was regarded as paid voluntarily, so that the maxim "*volenti non fit injuria*" would apply: 1 Salk. 22.[1] The authority of this decision, however, was soon questioned. Lord MANSFIELD declared that the case had been denied a thousand times: Cowper 199. At a later date a distinction was taken between transactions under statutes enacted on grounds of general policy, where each party violating the law is held to be in equal fault, and transactions under the usury laws, enacted to protect weak and needy men from being defrauded and oppressed. To the latter the law does afford relief. It regards the lender on usury

[1] Accord, Spalding v. Bank of Muskingum, 12 Oh. 544, 547 (1841).

as an oppressor, and the borrower as the injured and oppressed: Browning v. Morris, Cowp. 790; Briggs v. Thompson, 20 Johns. 294; Thomas v. Shoemaker, 6 Watts & Serg. 183. And in none of the cases do we discover that any other evidence of duress or oppression has been held to be necessary than such as is involved in the act itself of taking the money under an usurious contract. The principle of the statutes of usury seems to be that the lender alone is the wrongdoer, and that the borrower is his victim.[1]

In this case the jury was instructed that the plaintiff could recover whatever he had paid to the defendants (on account of principal, instalments, interest, fines, or otherwise) over and beyond the sum of $720 originally lent, and six per cent. interest thereon, and this even though the plaintiff, before his mortgage became due and could be demanded, proposed to the defendants to pay it and withdraw his stock, and although a settlement was had accordingly, and the mortgage was satisfied. By the term withdrawal of the stock it is to be understood not that stock was returned to the plaintiff, for none ever was, but that he should cease to be a stockholder. In effect, the transaction was an extinguishment of the stock. The parties agreed to treat with each other simply as debtor and creditor. Now, how is it possible that the fact that the settlement was made before the mortgage became due and payable can change the nature of the transaction? It still remains that the security which had been exacted was for a greater amount than the sum actually lent. The settlement and payment, therefore, were under the constraint of an usurious contract, and consequently, the "taking" the money was itself usurious, whether before or after the day of payment fixed in the mortgage. Nor can the character of the "taking" be changed by the fact that the defendants accepted a smaller amount of usurious interest than they would have received had they exacted all that the mortgage called for. Then, what is there in the withdrawal of the stock, in other words, its extinction, more than an application of the amount paid upon it toward the satisfaction of the debt? Certainly the defendants cannot say, after having taken an assignment of the stock as collateral security for the payment of the plaintiff's bond and mortgage, that its value was less than the amount of money paid to them upon it. When, therefore, he relinquished to them all his legal and equitable ownership, when he gave to them the benefit of all the payments he had made upon it, it is not easy to see why he is not to be credited with the amount of those payments toward the discharge of his debt. The stock may have been worth more than that amount. It could not have been worth less. The charge to the jury in this respect was, therefore, unexceptionable, and it was in entire harmony with what was said in Kupfert v. The Guttenberg Building Association, and Hughes's Appeal, 6 Casey 465 and 471.

[1] Accord, State Bank v. Ensminger, 7 Blackf. (Ind.) 105 (1844), and Brown v. McIntosh, 39 N. J. L. 22 (1876), the latter case containing a detailed review of the English cases.

We think, also, the court was right in refusing to charge the jury that there was evidence from which they might infer that the arrangement made and consummated between the parties was a sale of the stock to the defendants for the balance of the mortgage loan, after deducting all direct payments for principal and interest. We are unable to find any evidence which would warrant such an inference. A withdrawal of the shares, not a sale, was the thing proposed and assented to. Nothing more was intended, nothing more was done. Judgment affirmed.[1]

GROSS v. COFFEY.

111 ALA. 468.—1895.

McCLELLAN, J.—* * * * The question of chiefest importance in this case arises on the rulings of the trial court on charges requested, and is whether usury paid can be recovered back in an action of assumpsit; that is, in the absence of a promise to repay or refund it. At common law such recovery was allowed, and in many of the states the action is sustained. The ruling, however, at common law and in those states, except when their statutes expressly or impliedly authorize this action, goes upon the theory that a contract to pay usury is illegal and void, and not voidable merely; and the main difference between the statutes in the states referred to and our own lies in the fact that they either in terms declare, or have been construed and held to declare, such contracts absolutely void, while the statutes of Alabama do not so declare, but only provide that an usurious contract cannot, when the objection is properly taken to it, *be enforced* in respect of the usury or interest, but may be as to the principal, and have uniformly been held to render such contracts to that extent voidable at the election of the payor, but not in and of themselves illegal and void. The common-law doctrine, and the doctrine administered in those states which allow such recovery, is very ably and clearly stated by the supreme court of New Jersey through REED, J., in Brown v. McIntosh, 39 N. J. Law 22. The contrary view—that which denies such right of recovery—is maintained by the supreme court of Massachusetts, among others, and is expressly put upon the ground that the statutes of that state do not render a contract whereby usurious interest is allowed illegal and void; and upon this consideration the court differentiates its own conclusion from the contrary one reached by the New Hampshire and other

[1] Contra, Dickerson v. Raleigh Building Asso., 89 N. C. 37, 39 (1883), where the court says: "The courts of justice will not aid the defendant association, on the one hand, in the collection of its unlawful claims upon its members; nor will they, on the other, aid its corporators in their efforts to recover moneys they may have paid under engagements inoperative in law. *Ex dolo malo non oritur actio.* Mills v. B. & L. A., 75 N. C. 292; Latham v. B. & L. A., 77 N. C. 145; Commissioners v. Setzer, 70 N. C. 426."

courts, and referred to in argument, saying: "The consideration that now, by law, the contract is not void, distinguishes this case from those cited, and takes away the ground upon which they rested. The ground upon which it was formerly held that an action for money had and received would lie was that it was illegal and oppressive to take more than 6 per cent. interest, and therefore it could not conscientiously be retained from the person who had paid it. This was the ground upon which the case of Willie v. Green, 2 N. H. 333, was decided; for, although the statute of New Hampshire in force at that time was like our present law, in providing that three times the interest might be forfeited and deducted when such a contract was in suit, and gave a suit to recover back, not the whole, but a part, of the usurious interest, yet, unlike ours, it expressly prohibited the taking of more than 6 per cent., and thereby made it illegal. But as, by our statute, the contract is not illegal, the party who has suffered by paying usurious interest is confined to the statute remedies." Crosby v. Bennett, 7 Metc. (Mass.) 17. And upon like reasoning the same conclusion is reached in a number of other states whose statutes do not declare or render a contract involving usury illegal and void, but only provide defenses thereto in respect of the usury and interest, or forfeitures and the like. Van Vleet v. Sledge, 45 Fed. 743; McBroom v. Investment Co., 153 U. S. 318, 14 Sup. Ct. 852; Graham v. Cooper, 17 Ohio 605; Williamson v. Cole, 26 Ohio St. 207; Quinn v. Boynton, 40 Iowa 304; Smith v. Coopers, 9 Iowa 376; Philips v. Gephart, 53 Iowa 396, 5 N. W. 683; Bank v. Sherwood, 10 Wis. 230; Ransom v. Hays, 39 Mo. 445; Hadden v. Innes, 24 Ill. 381; Tompkins v. Hill, 28 Ill. 519; Lake v. Brown, 116 Ill. 83, 4 N. E. 773; Bank v. Lutterloh, 81 N. C. 142; Woolfolk v. Bird, 22 Minn. 341; Cornell v. Smith, 27 Minn. 132, 6 N. W. 460; Security Co. v. Aughe, 12 Neb. 504, 11 N. W. 753; Blain v. Willson (Neb.), 49 N. W. 224.

Alabama belongs to this latter category of states. Usurious contracts with us are not void. In any event, they are perfectly valid and binding so far as the principal is concerned, and are also good, and may even be enforced in our courts, as to the interest and usury, unless the payor elects to interpose the defense as to the latter items which the statute furnishes him. Code, §§ 1750, 1754; Masterson v. Grubbs, 70 Ala. 406; Burns v. Campbell, 71 Ala. 271; Bradford v. Daniel, 65 Ala. 133. And it is not claimed that the legislature has in any manner authorized an action for the recovery of usury paid. So that, if the question were an open one in this court, we should not hesitate to declare that usury voluntarily paid, as it was in the case at bar, if paid at all, cannot be recovered back in an action of assumpsit. The promise to pay it is not illegal and void, but voidable only, at the election of the promisor. Not availing himself of the statutory defense, it cannot be said that his act in paying or the promisee's act in receiving the usury is illegal. But the question is not an open one in Alabama. It was, in substance, decided, against the right of recovery back, in the celebrated case of Jones v.

Watkins, 1 Stew. 81, and expressly so ruled in the case of Noble v. Moses Bros., 74 Ala. 604, 621; and subsequent decisions in this latter case did not overrule the first opinion as to this point. The plaintiff must therefore recover, if at all, on the alleged promise of the defendant to repay and refund whatever of usury was included in the payment made by him to the defendant, and the recovery must, of course, be measured by the terms of that promise. * * * *[1]

SPENCER, CH. J., IN WHEATON v. HIBBARD.

20 JOHNS. (N. Y.) 290.—1822.

THE statute to prevent usury (1 N. R. L. 64), after regulating the rate of interest, authorizes the party paying usurious interest to sue for and recover the excess above 7 per cent., within one year then next, with costs of suit, in an action of debt, founded on the act; and it prescribes a succinct form of declaring. It then provides that if the person paying usury shall not, within the time aforesaid, really and *bona fide* commence his suit for the money so paid, or suffers it to be delayed or discontinued, then it shall be lawful for any other person, within one year after such neglect, to sue for and recover the same, in manner aforesaid, one moiety whereof is given to such person, and the other moiety to the use of the poor of the town in which the offense is committed.[2]

This provision is peculiar to our statute. By the 12 Anne, ch. 16, the party receiving more than the legal rate of interest, forfeited the treble value of the moneys or other things lent. It is contended that the person who pays above the legal rate of interest is confined to the statute remedy, and that he must not only sue in an action of debt, but that the suit must be within one year, or he is forever precluded. Now the principle is, that where a party has a remedy at common law for a wrong, and a statute be passed, giving a further remedy, without a negative of the common-law remedy,

[1] The Missouri statute provides that usurious interest cannot, if this defense is set up, be recovered from the debtor; but "the statute does not contemplate the recovery back of unlawful interest once paid on a usurious contract." See Peters v. Lowenstein, 44 Mo. App. 406, 409 (1891).

In Massachusetts the statute "provides that it shall be lawful 'to contract for payment and receipt of any rate of interest, provided, however, that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing.' The third section repeals §§ 3–5 of the Gen. Sts. c. 53. Under this statute, so long as an oral agreement to pay a greater rate of interest than six per cent. remains executory, it cannot be enforced. But it is lawful for parties to pay and to receive a greater rate, and if a greater rate is voluntarily paid, the excess over six per cent. cannot be recovered back."—Marvin v. Mandell, 125 Mass. 562, 564 (1878).

[2] For present statute, see New York General Business Law, §§ 370-382.

expressed or implied, he may, notwithstanding the statute, have his remedy by action at common law. 1 Com. Dig. Action on Statute, C. There are no words in the statute, either expressly or impliedly, negativing the common-law remedy. The injured party cannot have both remedies, and if he neglect to pursue the statute remedy for more than a year, his right of action at common law would be suspended during the second year, for, peradventure, a third person may prosecute.

NATIONAL BANK ACT.—In Barnet v. National Bank, 98 U. S. 555 (1878), in an action upon a bill of exchange, defendant sought to apply as payment upon the bill, usurious interest paid. The court said (p. 557): "The national currency act of Congress of June 3, 1864 (13 Stat. 99, § 30), after prescribing the rate of interest to be taken by the banks created under it declares:

'And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same; *provided,* that such action is commenced within two years from the time the usurious transaction occurred.' * * * * The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties. While the plaintiff in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by suit brought specially and exclusively for that purpose,—where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case, and mislead the jury to the prejudice of either party."[1]

REAL ESTATE TRUST CO. v. KEECH.

69 N. Y. 248.—1877.

THIS action was brought to foreclose a mortgage given to secure a bond for $19,000. The defense was usury. After the bond became due, it was agreed between plaintiff and defendant that in consideration of the sum of $1,000 paid by defendant, the time of payment should be extended for six months. The sum so paid was to be over and above lawful interest.

[1] Accord, Caponigri v. Altieri, 165 N. Y. 255 (1901), construing § 74 of the New York Banking Law.

Andrews, J.—The bond and mortgage were valid in their inception, and the usurious agreement for the extension of the time of payment after the debt became due, did not affect their validity. The agreement for forbearance was void, but the original debt and the securities given for it remained in full force. Blydenburg on Usury 97; Swartwout v. Payne, 19 J. R. 294; Merrills v. Law, 9 Cow. 65; Rice v. Welling, 5 Wend. 595; Farmers' and Mechanics' Bank v. Joslyn, 37 N. Y. 353.

The sum paid on the usurious agreement for forbearance will, in equity, be applied as a payment on the original debt, and the defendant was entitled to have the one thousand dollars paid by him on the unlawful agreement credited on the bond and mortgage. Crane v. Hubbel, 7 Paige 413; Judd v. Seaver, 8 id. 548. * * *[1]

---

v. *Duress of Person.*

MORSE v. WOODWORTH.

155 Mass. 233.—1892.

Action of contract to recover the amount of three promissory notes given by defendant to plaintiff, and delivered up to defendant by plaintiff and mutual releases executed under threats of prosecution and arrest on a criminal charge of embezzling defendant's money.

The court charged the jury in substance that to constitute duress by threats of imprisonment the threats must be such as actually overcame the will of the plaintiff, and that in testing the question

[1]Generally at common law "the right to recover the usurious excess does not accrue until after the loan with legal interest has been paid. Doug. 697; Briggs v. Thompson [20 J. R. 293]; see remarks of Paige, J., 2 Seld. 113." Wheelock v. Lee, 64 N. Y. 242, 246 (1876). Now contra by statute in New York, see New York General Business Law, § 377.

In Davis v. Converse, 35 Vt. 503 (1863), the court says (p. 507): "It now seems to be settled by repeated decisions, that where usury is included in a note or other security, and when paid is endorsed upon the note, it is to be considered as a payment upon the note itself, and no action can be maintained to recover back the usury paid, so long as there remains due any part of the principal and lawful interest, but that where the security is only for the principal and legal interest, and the unlawful interest is either put into a separate obligation, or rests in a verbal agreement, so that when paid it is not endorsed upon the note, but is paid as usury *eo nomine*, it is otherwise, and a right of action accrues immediately to sue and recover it back, though the lawful debt is still unpaid. Grow v. Albee, 19 Vt. 540; Nelson v. Cooley, 20 Vt. 201; Day v. Cummings, 19 Vt. 496; Nichols v. Bellows, 22 Vt. 581; Ward v. Whitney, 32 Vt. 89."

In Cummings v. Knight, 65 N. H. 202 (1889), the payor of usurious interest was not allowed to have it applied upon the principal after his right to recover such interest had been barred by the Statute of Limitations.

the jury might consider whether they were such as would overcome the will of a man of ordinary firmness; and refused to charge, at the request of defendant, that if the defendant believed plaintiff had wrongfully taken money belonging to defendant, and no civil or criminal proceeding had been begun, then mere threats of prosecution or arrest would not constitute duress, that mere threats of criminal prosecution or arrest, when no warrant has been issued or proceedings commenced, do not constitute duress. The court referred to the ambiguity in the word "mere," and reiterated its former charge. Defendant excepted. Verdict for plaintiff.

KNOWLTON, J. * * * * The only remaining exceptions relate to the requests of the defendant and the rulings of the court in regard to duress. The plaintiff contended that he gave up the notes and signed the release under duress by threats of imprisonment. The question of law involved is whether one who believes and has reason to believe that another has committed a crime, and who, by threats of prosecution and imprisonment for the crime, overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress.

Duress at the common law is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear, which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

To set aside a contract for duress it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. It must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means

have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid a contract if such imprisonment is unlawfully used to obtain the contract. Richardson v. Duncan, 3 N. H. 508. See also Foshay v. Ferguson, 5 Hill (N. Y.) 154; United States v. Huckabee, 16 Wall. 414, 431; Miller v. Miller, 68 Penn. St. 486; Walbridge v. Arnold, 21 Conn. 424; Wood v. Graves, 144 Mass. 365, and cases cited.

It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is, whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's.

We are aware that there are cases which tend to support the contention of the defendant. Harmon v. Harmon, 61 Maine 227; Bodine v. Morgan, 10 Stew. 426, 428; Landa v. Obert, 45 Texas 539; Knapp v. Hyde, 60 Barb. 80. But we are of opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. Hackett v. King, 6 Allen 58; Taylor v. Jaques, 106 Mass. 291; Harris v. Carmody, 131 Mass. 51; Bryant v. Peck & Whipple Co., 154 Mass. 460; Williams v. Bayley, L. R. 1 H. L. 200; s. c. 4 Giff. 638, 663, note; Eadie v. Slimmon, 26 N. Y. 9; Adams v. Irving National Bank, 116 N. Y. 606; Foley v. Greene, 14 R. I.

618; Sharon v. Gager, 46 Conn. 189; Bane v. Detrick, 52 Ill. 19; Fay v. Oatley, 6 Wis. 42.

We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement. The rulings and refusals to rule were correct.

Exceptions overruled.

SILSBEE v. WEBBER.

171 Mass. 378.—1898.

PRESENT: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP and BARKER, JJ.

HOLMES, J.—This is an action to recover money alleged to have been got from the plaintiff by duress. In the court below a verdict was directed for the defendant, and the case was reported. The plaintiff's son had been in the defendant's employ, had been accused by him of stealing the defendant's money, had signed a confession, whether freely or under duress is not material, and had agreed to give security for $1,500. There was a meeting between plaintiff and defendant, in the course of which, as the plaintiff testified, the defendant said he should have to tell the young man's father, the plaintiff's husband. At that time, according to her, her husband had trouble in his head, was melancholy, very irritable, and unable to sleep, so that she feared that if he were told the knowledge would make him insane. The plaintiff further testified that she previously had talked with the defendant about her husband's condition, and that she begged him not to tell her husband, and told him that he knew what her husband's condition was, but that he twice threatened to do it in the course of his inquiries as to what property she had, and that to prevent his doing so she the next day went by agreement to the office of the defendant's lawyer, and executed an assignment of her share in her father's estate. Her son was present, and, as he says, protested that this was extortion and blood money. It is under this assignment that the money sued for was collected. In the opinion of a majority of the court, if the evidence above stated was believed, we cannot say that the jury

would not have been warranted in finding that the defendant obtained, and knew that he was obtaining, the assignment from the plaintiff solely by inspiring the plaintiff with fear of what he threatened to do; that the ground for her fear was, and was known to be, her expectation of serious effects upon her husband's health if the defendant did as he threatened; and that the fear was reasonable, and a sufficiently powerful motive naturally to overcome self-interest, and therefore the plaintiff had a right to avoid her act. Harris v. Carmody, 131 Mass. 51, 53, 54; Morse v. Woodworth, 155 Mass. 233, 250.

It is true that it has been said that the duress must be such as would overcome a person of ordinary courage. We need not consider whether, if the plaintiff reasonably entertained her alleged belief, the well-grounded apprehension of a husband's insanity is something which a wife ought to endure rather than part with any money, since we are of opinion that the dictum referred to, if taken literally, is an attempt to apply an external standard of conduct in the wrong place. If a party obtains a contract by creating a motive from which the other party ought to be free, and which in fact is, and is known to be, sufficient to produce the result, it does not matter that the motive would not have prevailed with a differently constituted person, whether the motive be a fraudulently created belief or an unlawfully created fear. Even in torts, the especial sphere of external standards, if it is shown that in fact the defendant by reason of superior insight contemplated a result which a man of ordinary prudence would not have foreseen, he is answerable for it; and, in dealing with contributory negligence, the personal limitations of the plaintiff, as a child, a blind man, or a foreigner unused to our ways, always are taken into account. Late American writers repudiate the notion of a general external measure for duress, and we agree with them. Clark, Contracts, 357; Bishop, Contracts, (ed. 1887) § 719. See James v. Roberts, 18 Oh. 548, 562; Eadie v. Slimmon, 26 N. Y. 9, 12.

The strongest objection to holding the defendant's alleged action illegal duress is, that if he had done what he threatened, it would not have been an actionable wrong. In general, duress going to motives, consists in the threat of illegal acts. Ordinarily, what you may do without liability, you may threaten to do without liability. See Vegelahn v. Guntner, 167 Mass. 92, 107; Allen v. Flood [1898], A. C. 1, 129, 165. But this is not a question of liability for threats as a cause of action, and we may leave undecided the question whether, apart from special justification, deliberately and with foresight of the consequences to tell a man what you believe will drive him mad is actionable if it has the expected effect. Spade v. Lynn & Boston Railroad, 168 Mass. 285, 290; White v. Sander, 168 Mass. 296. If it should be held not to be, contrary to the intimations in the cases cited, it would be only on the ground that a different rule was unsafe in the practical administration of justice. If the law were an ideally perfect instrument, it would give damages for such

a case as readily as for a battery. When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat. In the case of the threat there are no difficulties of proof, and the relation of cause and effect is as easily shown as when the threat is of an assault. If a contract is extorted by brutal and wicked means, and a means which owes its immunity, if it have immunity, solely to the law's distrust of its own powers of investigation, in our opinion the contract may be avoided by the party to whom the undue influence has been applied. Some of the cases go further, and allow to be avoided contracts obtained by the threat of unquestionably lawful acts. Morse v. Woodworth, 155 Mass. 233, 251; Adams v. Irving National Bank, 116 N. Y. 606; Williams v. Bayley, L. R. 1 H. L. 200, 210.

In the case at bar there are strong grounds for arguing that the plaintiff was not led to make the assignment by the duress alleged. They are to be found in the fact that the plaintiff sought the defendant; in her testimony that, when she made the assignment, she wanted the defendant to have full security for all her son owed him; and in the plaintiff's later conduct;—but we are considering whether there was a case of duress for the jury.

The assignment was on October 10, 1894. Before March 12, 1895, the plaintiff had joined with her sisters in employing a lawyer to secure her share in her father's estate, intending it to be paid over to the defendant. On March 12, 1895, to the same end, she signed a petition for distribution, setting forth the assignment, and afterwards took some further steps and never made any claim that the assignment was not valid until December 19, 1895, before which time it had come to the knowledge of her husband. Apart from the weight which these facts may give to the argument that the plaintiff did not act under duress, they found an independent one, that if she did act under duress she has ratified her act. The assignment was formally valid. The only objection to it, if any, was the motive for it. Fairbanks v. Snow, 145 Mass. 153, 154. Therefore it might be ratified by the plaintiff when she was free. But the acts relied on were done in connection with a member of the bar, who had been the defendant's lawyer before he undertook to act for the plaintiff, and who plainly appeared to be acting for the plaintiff only in the defendant's interest. We cannot say that the jury might not find that the later acts of the plaintiff, if not done under the active influence of her supposed original fear, at least were done before the plaintiff had gained an independent foothold, or realized her independence of her rights. We are of opinion that the case should have been left to the jury. Adams v. Irving National Bank, 116 N. Y. 606, 614, 615.

Verdict set aside, and case to stand for trial.

KNOWLTON, J. (dissenting).—* * * * I can see nothing in the evidence that tends to show that the defendant was guilty of any wrong towards the plaintiff. What he proposed could do no

direct harm to the person or property of the plaintiff or of her husband. At most, there was merely a possibility or a probability of suffering and harm from reflection upon facts for whose existence the defendant was not responsible, and which the husband would be likely to learn at some time from others if the defendant did not tell him. But this probability, viewed from the defendant's knowledge and information, was no greater than would be expected in the case of any man who was irritable, melancholy, and unable to sleep from trouble in his head, yet whose ailments were not so severe as to prevent him from managing a somewhat extensive and important business. Reading the testimony without favor or prejudice, I do not see how any imputation against the defendant of an improper purpose in saying to the plaintiff that he should have to tell her husband can be founded on anything more than conjecture. The presumptions are in favor of honesty and fair dealing, and the testimony is to be interpreted accordingly.

Moreover, there is nothing to show a belief on the part of the defendant that the statement that he should tell her husband would overcome the plaintiff's will. Upon his understanding of the facts such a suggestion would not be expected to overcome the will of any person of ordinary firmness, and there is no evidence that she was supposed by him to be, or that she was in fact, less firm than other women. Whether the rule so often stated in the books, that to avoid a contract on the ground of duress by threats, a threat must be such as would overcome the will of a person of ordinary firmness, be of universal application or not, it undoubtedly furnishes a correct guide in cases in which there is nothing to show that the party who seeks to avoid the contract was not of ordinary courage and firmness.

Upon an extended examination of the authorities, I have found no case in which a contract has been set aside on the ground of duress on such evidence as appears in this case. I think the ruling of the Superior Court was correct.

The Chief Justice and Mr. Justice LATHROP concur in this dissent.

MARSHALL, J., IN GALUSHA v. SHERMAN.

105 WIS. 263, 272, 274, 280.—1900.

ANCIENTLY, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant or courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law; that is to say, the resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the

standard of a man of courage; and those things which could overcome a person, assuming that he was a prudent and constant man, were not left to be determined as facts in a particular case, but were a part of the law itself. Co. Litt. 253. Said Sir William Blackstone (volume 1, p. 130): "Whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed or do any other legal act, these, though accompanied by all the other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance." "The constraint a man is under in these circumstances is called in law *duress.*" "A fear of battery or being beaten, though never so well grounded, is no duress, neither is the fear of having one's house burned, or one's goods taken away and destroyed, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages. But no suitable atonement can be made for the loss of life or limb." Duress of imprisonment existed, by the old rule, only where there was actual, illegal restraint of liberty. The doctrine was, "If a man be imprisoned by order of law, the plaintiff may take a feoffment of him, or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment; for this is not by duress of imprisonment, because he was in prison by course of law, for it is not accounted in law duress of imprisonment, but where either the imprisonment, or the duress that is offered in prison, or at large, is tortious and unlawful." 2 Bac. Abr. 771. Thus it will be seen that, in the early days of the common law, duress, strictly so called, was matter of law. It was pleadable as a defense or as material to a cause of action, by alleging the existence of specific circumstances legally sufficient to constitute duress, and was established *prima facie* by proving the truth of such allegations. The effect of the facts so established was determinable as an inference of law, not of fact. Oppression of one person by another, causing such person to surrender something of value or some advantage to such other, not amounting to duress within the rigorous rules of law, regardless of whether the oppression actually deprived the oppressed party of the exercise of his free will, was remediless, except by an appeal to a court of equity, where a remedy was obtainable on the ground of unlawful compulsion. Id. 772. * * * *

Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness. That will be found by reference to some of the earlier editions of Chitty on Contracts. See 1 Chitty, Cont. (11th ed.) 272; 2 Greenl. Ev. 301. But the ancient theory that duress was a matter of law to be determined *prima facie* by the existence or non-existence of some circumstance deemed in law sufficient to deprive the alleged wronged person of freedom of will

power, was adhered to generally, the standard of resisting power, however, being changed so that circumstances less dangerous to personal liberty or safety than actual deprivation of liberty or imminent danger of loss of life or limb came to be considered sufficient in law to overcome such power. The oppressive acts, though, were still referred to as duress, instead of the actual effect of such acts upon the will power of the alleged wronged person. It is now stated, oftener than otherwise, in judicial opinions, that in determining whether there was or was not duress in a given case, the evidence must be considered, having regard to the assumption that the alleged oppressed person was a person of ordinary courage. * * * *

The true doctrine of duress, at the present day, both in this country and in England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage, and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him.[1]

[1] Accord, Cribbs v. Sowle, 87 Mich. 340 (1891). But see Detroit Nat. Bank v. Blodgett, 115 Mich. 160 (1897), where, upon an application for a rehearing, the court says (p. 169): "Before the filing of the opinion, the record and briefs were carefully examined by the whole court, and, from such examination, we were all of the opinion that the defense sought to be made of undue influence by the elder Blodgett upon his two sons, Charles and Ralph, was not sustained by the proofs. As it was there said: 'Duress or undue influence must be such as would overcome the will of a person of ordinary firmness.' No such influence was shown to exist; on the contrary, it clearly appeared from the testimony of Charles that he executed the mortgage to keep peace in the family, and, from the testimony of Ralph, that he executed it under the direction and advice of his attorney. We can but reiterate that the defendants wholly failed to establish any such claim as set up."

HAYNES v. RUDD.

83 N. Y. 251.—1880.

APPEAL from judgment of General Term of the Supreme Court, in the fourth judicial department, entered upon an order made June 21, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 17 Hun 477.) The testimony in this cause was to the following effect: The plaintiff's son had been in the employ of the defendant as clerk, and it was claimed that he had feloniously taken and carried away money from his employer. A criminal prosecution was threatened, and to prevent it plaintiff gave his note for $250 to his wife, who endorsed it in such a manner as to charge her separate estate therewith, and delivered it to the defendant, who transferred it, before it was due, to a purchaser in good faith, to whom the plaintiff was obliged to pay it. This action was brought to recover back the moneys paid. The questions presented arose upon the charge of the court, which is stated in the opinion.

FOLGER, Ch. J.—The judgment in this case should be reversed. The trial court instructed the jury that if they found that the note was given on the illegal consideration of the compounding an alleged crime, it was void; that it had no legal force or effect, and the plaintiff was entitled to recover the amount of the note with interest. The trial court refused to instruct the jury that if there was no fraud, duress or undue influence on the part of the defendant, and that the note was given simply to compound a felony, then the plaintiff was not entitled to recover. We think this was error. If there was simply a compounding of felony, both plaintiff and defendant, on an equality, agreeing that the plaintiff should give his written promise to the defendant, and that, therefore, the defendant should give his oral promise to conceal the felony, and abstain from prosecuting it, and withhold the evidence of it, then they were *in pari delicto*, and the law will leave them where it finds them. (Fivaz v. Nicholls, 2 C. B. 501.) To give the plaintiff any claim to recover, he must show that he was in such plight from the force or threats of the defendant as that he was in duress, and gave the note without being willing to, to escape from the predicament in which that force or those threats put him. We will not now say, that one who aids in doing an act that is by the law made a criminal offense, may, in any circumstances, have an action to recover anything paid by him in furtherance thereof; but we do say, that if he does it voluntarily, by which we mean without force or threats compelling his will, he may not maintain an action. The instruction and refusal of the trial court amounted to just the reverse of this and was erroneous.

The learned General Term seems to have overlooked the request to charge and refusal. The judgment should be reversed and a new

trial had, with costs to abide the event. All concur. Judgment reversed.[1]

PUCKETT v. ROQUEMORE.

55 GA. 235.—1875.

BLECKLEY, Judge.[2]—1. When a person is indicted for stealing money, he may make restitution. If he be guilty, he is under both a civil and moral obligation to do so. He can be sued for it, and compelled to refund. If he be innocent, he may, nevertheless, waive the question of guilt or innocence, and make voluntary payment. Trial and acquittal afterwards will not entitle him to recover it back; if he meant to stand upon that issue, he ought to have done so at first, and refused to pay. In the present case there was no duress or fraud; the party seems not to have been in custody, but free; and it appears that the proposition to settle came from himself. Upon the supposition that he paid without any unlawful agreement, there is no ground on which he can reclaim the money, although he has since been acquitted of the charge. Perhaps his acquittal *may*

[1] When, after a new trial, the case came again to the Court of Appeals, 102 N. Y. 372 (1886), the court, by Miller, J., stated the rule as follows (p. 376): "While fraud, duress and undue influence employed in procuring a contract for the payment of money may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist, and cannot be enforced where the consideration of the contract, thus made, arises entirely upon or is in any way affected by the compounding of a felony. When this element enters into the contract it becomes tainted with a corrupt consideration and cannot be enforced. * * * If the consideration of the note was in any way affected by the compounding of a felony, or it entered into the same, or such a motive actuated the plaintiff in any respect, then the contract was illegal and should not be upheld. In such a case the contract was vicious and corrupt, and in violation of law as much as if compounding a felony had been the entire consideration. The element of illegality constituted a part of the contract, thus vitiating the whole, and it could not be rejected because duress, undue influence or threats were also blended with it."

In Adams v. Irving Nat. Bank, 116 N. Y. 606 (1889), the court says (p. 614): "If the money was paid by the plaintiff, through fear, produced by Mr. Castre's representations, that if the claim was not settled, her husband would be arrested and imprisoned, the payment was not a voluntary one, and the defendant obtained no title to the money received. This question was settled in plaintiff's favor by the verdict of the jury. The point made by the appellant that the transaction was a compounding of a felony does not appear to be raised by any appropriate exception in the case. It was not suggested on the trial, either in the motion to dismiss or in the request to charge. There was no instruction asked or given to the jury on the subject. The question is, therefore, not before this court."

[2] The facts are not officially reported except as they are embraced in the opinion.—ED.

be due to the fact that he extracted from the prosecution all its vigor, by soothing the prosecutor with this repayment, and lulling him into inaction.

2. If the money was paid on an illegal agreement that the prosecution should be settled or discontinued, or even that the prosecutor should use his influence to have it suppressed, the party is equally without remedy. In contemplation of law such a contract is vicious and corrupt, and both parties are at fault, in *pari delicto*. The law leaves them where it finds them—in the bed which they have made for themselves they must lie.

Judgment affirmed.

---

c. Compulsion of Law.

i. *Recovery of Money Paid After Action Begun.*

1. BEFORE JUDGMENT.

MOORE v. VESTRY OF FULHAM.

[1895] 1 Q. B. 399 (Court of Appeal).

On September 19, 1893, the defendants issued a summons, under the Metropolis Management Acts, against the plaintiff, returnable at the West London Police Court on October 3, to enforce payment of a sum of £35 13s. 9d., the proportionate part of the expenses of making up a road in their district called Silvio Street, found due from the plaintiff as one of the owners of the land abutting on the road. On October 2 the plaintiff, in the mistaken belief that his property abutted upon the road, sent a check to the defendants for the amount. On the summons being called on for hearing it was, at the request of the defendants, adjourned till October 24, and the defendants informed the plaintiff of this fact. On October 19, the plaintiff's solicitor wrote to the defendants demanding a return of the money, on the ground that the plaintiff's property did not abut upon the road, and that the plaintiff was consequently not liable, and informing them that, if the money were not returned, he should attend the adjourned hearing of the summons. The defendants replied that, inasmuch as the plaintiff had paid the money, they would be pleased to withdraw the summons without the plaintiff's attendance. Neither the plaintiff nor his solicitor attended, and, by leave of the magistrate, the summons was withdrawn. On November 17 the plaintiff's solicitor again wrote to the defendants for the return of the money. On January 30, 1894, the plaintiff issued the writ in this action for £35 13s. 9d., for money had and received by the defendants to the use of the plaintiff, and for money paid under a mistake of fact.

The learned judge held that the plaintiff was precluded from bringing the action by the fact that, after he had notice of the mistake, he allowed the summons to be withdrawn.

The plaintiff appealed.

Lord Halsbury.—I am of opinion that this appeal fails. The principle of law has not been quite accurately stated by counsel for the appellant, because the principle of law is not that money paid under a judgment, but that money paid under pressure of legal process cannot be recovered. The principle is based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defense to the original action. In Milnes v. Duncan, 6 B. & C. 671, Holroyd, J., states quite accurately what I think is the principle. He says: "If the money had been paid after proceedings had actually commenced, I should have been of opinion that inasmuch as there was no fraud in the defendant it could not be recovered back." And in Hamlet v. Richardson, 9 Bing. 644, Tindal, C. J., delivering the judgment of the court says: "We think that the rule of law is accurately laid down by Holroyd, J., and that, as the money was paid in this case after the suing out (of) process to recover it, the defendants in the former action knowing the cause of action for which the writ was sued out before they paid the money, and there being no fraud on the part of the plaintiff in that action, it appears to us that no action is maintainable to recover it back." That is the broad principle, and it is manifest that the effort to confine it to a case where judgment has been delivered is inconsistent with what is laid down in all the cases, because I think in every one of them, so far as I remember, the money was paid before the process had arrived at judgment. In the case upon which such reliance has been placed [Caird v. Moss, 33 Ch. D. 22, 36], my brother Lopes, in dealing with the case then before him, not unnaturally referred to the fact of the judgment still standing, and for this reason, because the money in that case was paid under a judgment founded on the construction of an agreement. Then an action was brought to rectify that agreement on the ground that such a construction was contrary to the intention of all the parties. My brother Lopes, without going into the merits of the case, practically says this: "Why, this judgment stands now; you cannot reopen that question. You had full opportunity of commencing these proceedings while the former action was pending, and ought to have done so, and we cannot now interfere with that judgment. That judgment still stands." It is quite true that, read without connection with the matter that was then being decided, that looks as if my brother Lopes was putting a qualification upon the general rule of law, but, when the facts are looked at, it is clear that he was doing nothing of the sort. He was referring to the fact that the money was paid in that particular case under a judgment, and that the judgment was still standing, and no effort had been made to upset

it. Under those circumstances, it was a matter of course that the money could not be recovered back. I am opinion that the judgment of my brother DAY was quite right, and that the appeal ought to be dismissed.

LINDLEY, L. J.—I am also entirely of the same opinion. I think that the case is absolutely covered, not by one authority, but by a string of authorities, of which Hamlet v. Richardson, 9 Bing. 644, is as good a type as any. The money there was paid after a writ to recover it had been issued and served, and after an appearance had been entered. But what does that mean? It means this: that the defendant says in substance to his opponent, "I do not intend to fight you. I will pay rather than fight." If he chooses to take that course he cannot back out of it, whether he discovers that he has made a mistake or not. That is the *ratio decidendi* in that case and in several others. Of course, money paid under a judgment may be recovered if that judgment is set aside. The Court of Appeal in setting aside a final judgment always orders the money paid under it to be refunded. That is what my brother LOPES had in his mind in Caird v. Moss, 33 Ch. D. 22, 36. Of course the plaintiff cannot recover back here.

Appeal dismissed.[1]

[There was also a concurring opinion by SMITH, L. J.]

CHANDLER v. SANGER AND ANOTHER.

114 MASS. 364.—1874.

CONTRACT for money had and received. At the trial in the Superior Court, before ROCKWELL, J., the plaintiff, in opening his case, stated that he expected to prove that the plaintiff was a dealer in ice, and furnished ice each week day to parties in Boston, under contracts to furnish a certain amount daily, upon all week days; that his custom was to have his carts loaded by twelve o'clock on Sunday night, in order to start early Monday morning; that any failure on the part of the plaintiff to furnish his customers with ice on Monday would be a great injury to him; that Monday morning, July 12, 1869, he had standing in his sheds at Brighton, adjoining his icehouse, five heavy two-horse teams loaded with ice, ready to start for Boston before light; that the defendant Sanger held his promissory note and had proved it against his estate in insolvency; that in the insolvency proceeding he had obtained his discharge; that the defendants knew these facts; that the defendant Sanger and the other defendant, who was an attorney-at-law, brought an

[1] See Mowatt v. Wright, 1 Wend. (N. Y.) 355 (1828), for a general discussion of this question in its relation to other cases of recovery of involuntary payments.

action on this promissory note, under circumstances which would satisfy the jury that the action was commenced and carried on by them fraudulently, with the purpose of extorting money from the plaintiff by duress, under color of legal process; that in pursuance of this purpose, they went about two o'clock on Monday morning with a writ in the hands of an officer and made an attachment of the carts, horses, and harnesses; that the attorney-at-law, who had been with the officer in making the attachment, went to the plaintiff's house and informed him of the attachment, and told him that none of the property so attached could go to Boston unless the claim should first be settled by the payment of $300; that the plaintiff told the attorney that he did not owe anything, and said he would dissolve the attachment by giving a bond; that the attorney then told him that it would take three days to dissolve it, and that for that time the property would be held under it, and that his discharge in insolvency did not cut off the claim; that the plaintiff believed these statements, and being ignorant of the method of dissolving attachments and being in fear of great loss in his business, to relieve the property from attachment he paid the $300 to the attorney under protest, stating that he should claim and enforce his rights, and recover back the money.

The presiding judge being of the opinion that these facts, if proved, would not sustain the action, so ruled; whereupon, by consent of the parties, he reported the case to this court for their decision. It was agreed that if the court should be of opinion that these facts, if proved, were sufficient to sustain the action, then it was to stand for trial; otherwise judgment was to be entered for the defendants.

Gray, J.—This is not an action of tort, to recover damages for malicious prosecution, or abuse of legal process, but an action of contract, in the nature of assumpsit, for money had and received by the defendants, which they have no legal or equitable right to retain as against the plaintiff. Although the process sued out for the defendant was in due form, yet if, as was offered to be proved at the trial, he fraudulently, and knowing that he had no just claim against the plaintiff, arrested his body or seized his goods thereon, for the purpose of extorting money from him, then, according to all the authorities, the payment of money by the plaintiff, in order to release himself or his goods from such fraudulent and wrongful detention, was not voluntary, but by compulsion; and the money so paid may be recovered back, without proof of such a termination of the former suit as would be necessary to maintain an action for malicious prosecution. Watkins v. Baird, 6 Mass. 506; Shaw, C. J., in Preston v. Boston, 12 Pick. 7, 14; Benson v. Monroe, 7 Cush. 125, 131; Carew v. Rutherford, 106 Mass. 1, 11, et seq.; Richardson v. Duncan, 3 N. H. 508; Sartwell v. Horton, 28 Vt. 370; Gibson, C. J., in Colwell v. Peden, 3 Watts 327, 328; Cadaval v. Collins, 4 A.

& E. 858; Parke, B., in Oates v. Hudson, 6 Ex. 346, 348, and in Parker v. Bristol and Exeter Railway Co., 6 Ex. 702, 705.

New trial ordered.

TURNER v. BARBER.

66 N. J. L. 496.—1901.

Garrison, J.—This is an action brought in the Salem pleas upon an appeal to recover money paid by Turner to Barber's proctor in admiralty. The ground of the plaintiff's action was that the money so paid had been obtained from him by duress of his goods. The duress referred to was the seizure and detention of a scow belonging to Turner by the deputy United States marshal under a monition of libel issued in a suit in admiralty brought by Barber against the scow for wharfage. To effect the release of the scow, Turner, without contesting the claim, paid it under protest to the proctor of the libelant, and then sued Barber on it in the court for the trial of small causes, and recovered a judgment against him. Upon an appeal by Barber to the common pleas, a similar judgment was recovered by Turner. Thereupon Barber removed the judgment of the pleas to this court by a writ of certiorari. The facts found by the court of common pleas appear in the return made by the judge of that court in response to a rule.

The judgment of the common pleas must be reversed. The plaintiff did not make out a case of extortion. The payment by the plaintiff of the claim for wharfage with full knowledge of the facts was a voluntary one, even if he did not owe it.

The proposition maintained by the case annotated upon this subject in Smith's Leading Cases is that money paid under regular legal process in a judicial proceeding, without contest, and with a full knowledge of the facts, is, in the absence of fraud, not recoverable. 2 Smith, Lead. Cas. (8th Am. Ed.) 436.

There is nothing in the facts of the present case to take it out of this rule, or to invoke the rule with respect to the duress of goods. The court decided that the plaintiff did not owe the wharfage, but did [not] find fraud in the libelant, or that he knew or ought to have known that the scow was not liable for the wharfage, or even that he knew of the pending sale of the scow, and timed his process as a means of extortion. The essential factors of a duress of goods by the use of process were lacking. The libelant had not received pay for the scow's use of the wharf, and had a legal right to test its liability in a competent tribunal of his own selection. Moreover, a complete answer to the claim of duress is contained in the finding of the trial court that the "plaintiff was of ample pecuniary ability to give sufficient bond to enable him to procure the release of the said boat from the custody of the said United States marshal."

This fact destroys the force of the plaintiff's contention that the immediate delivery by him of his boat to complete a contract of sale compelled him to pay the claim against it. Under the circumstances his payment of the claim was a matter of convenience merely. The course pursued by the plaintiff enabled him to release his boat without litigating the validity of the claim against it in a tribunal where the libelant had acquired a right to have the matter decided. To permit the matter to be afterwards litigated in a forum of the plaintiff's choosing is contrary to sound policy. His payment of the admiralty claim must be deemed to have been made voluntarily, and without fraud or force.

The judgment of the pleas must be reversed and set aside, and a judgment of non-suit entered.

---

2. AFTER JUDGMENT.

MOSES v. MACFERLAN.

2 BURR. (K. B.) 1005.—1760.

LORD MANSFIELD delivered the resolution of the court in this case, which stood for their opinion: "Whether the plaintiff could recover against the defendant in the present form of action (an action upon the case for money had and received to the plaintiff's use), or whether he should be obliged to bring a special action upon the contract and agreement between them."

It was an action upon the case, brought in this court by the now plaintiff, Moses, against the now defendant, Macferlan (heretofore plaintiff in the Court of Conscience, against the same Moses now plaintiff here), for money had and received to the use of Moses, the now plaintiff in this court.

The case, as it came out upon evidence and without dispute at *nisi prius* before Lord MANSFIELD at Guildhall, was as follows:—

It was clearly proved, that the now plaintiff, Moses, had indorsed to the now defendant, Macferlan, four several promissory notes made to Moses himself by one Chapman Jacob, for 30s. each, for value received, bearing date 7th November, 1758; and that this was done in order to enable the now defendant, Macferlan, to recover the money in his own name, against Chapman Jacob. But previous to the now plaintiff's indorsing these notes, Macferlan assured him "that such his indorsement should be of no prejudice to him;" and there was an agreement signed by Macferlan, whereby he (amongst other things) expressly agreed "that Moses should not be liable to the payment of the money, or any part of it; and that he should not be prejudiced, or be put to any costs, or any way suffer, by reason of such his indorsement." Notwithstanding which express condition and agreement, and contrary thereto, the present defendant,

Macferlan, summoned the present plaintiff, Moses, into the Court of Conscience, upon each of these four notes, as the indorser thereof respectively, by four separate summonses. Whereupon Moses (by one Smith, who attended the Court of Conscience at their second court, as solicitor for him and on his behalf) tendered the said indemnity to the Court of Conscience, upon the first of the said four causes; and offered to give evidence of it and of the said agreement, by way of defense for Moses in that court. But the Court of Conscience rejected this defense, and refused to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge of it; and gave judgment against Moses, upon the mere foot of his indorsement (which he himself did not at all dispute), without hearing his witnesses about the agreement "that he should not be liable;" for the commissioners held this agreement to be no sufficient bar to the suit in their court; and consequently decreed for the plaintiff in that court, upon the undisputed indorsement made by Moses. This decree was actually pronounced in only one of the four causes there depending; but Moses's agent (finding the opinion of the commissioners to be as above mentioned) paid the money into that court upon all the four notes; and it was taken out of court by the now defendant, Macferlan (the then plaintiff in that court), by order of the commissioners.

All this matter appearing upon evidence before Lord MANSFIELD at *nisi prius* at Guildhall, there was no doubt but that, upon the merits, the plaintiff was entitled to the money; and accordingly a verdict was there found for Moses, the plaintiff in this court, for 6*l.* (the whole sum paid into the Court of Conscience), but subject to the opinion of the court upon this question, "Whether the money could be recovered in the present form of action, or whether it must be recovered by an action brought upon the special agreement only."

The court having heard the counsel on both sides, took time to advise.

Lord MANSFIELD now delivered their unanimous opinion, in favor of the present action.

There was no doubt at the trial, but that upon the merits the plaintiff was entitled to the money; and the jury accordingly found a verdict for the 6*l.*, subject to the opinion of the court upon this question, "Whether the money might be recovered by this form of action," or "must be by an action upon the special agreement only."

Many other objections, besides that which arose at the trial, have since been made to the propriety of this action in the present case.

The 1st objection is, "That an action of debt would not lie here; and no assumpsit will lie where an action of debt may not be brought;" some sayings at *nisi prius,* reported by note-takers who did not understand the force of what was said, are quoted in support of that proposition. But there is no foundation for it.

It is much more plausible to say, "That where debt lies an action upon the case ought not to be brought." And that was the point

relied upon in Slade's case, 4 Co. 92; but the rule then settled and followed ever since is, "That an action of assumpsit will lie in many cases where debt lies, and in many where it does not lie."

A main inducement, originally, for encouraging actions of assumpsit was, "to take away the wager of law;" and that might give rise to loose expressions, as if the action was confined to cases only where that reason held.

2d Objection. "That no assumpsit lies except upon an express or implied contract; but here it is impossible to presume any contract to refund money which the defendant recovered by an adverse suit."

Answer. If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract (*"quasi ex contractu,"*) as the Roman law expresses it.

This species of assumpsit ("for money had and received to the plaintiff's use") lies in numberless instances for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had by law authority to receive from such third person.

3d Objection. Where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be brought over again by a new action.

Answer. It is most clear "that the merits of a judgment can never be over-haled by an original suit, either at law or in equity." Till the judgment is set aside or reversed, it is conclusive, as to the subject-matter of it, to all intents and purposes.

But the ground of this action is consistent with the judgment of the Court of Conscience; it admits the commissioners did right. They decreed upon the indorsement of the notes by the plaintiff, which indorsement is not now disputed. The ground upon which this action proceeds was no defense against that sentence.

It is enough for us, that the commissioners adjudged "they had no cognizance of such collateral matter." We cannot correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction, to be right. But we think "the commissioners did right, in refusing to go into such collateral matter." Otherwise, by way of defense against a promissory note for 30*s.*, they might go into agreements and transactions of a great value; and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account.

The ground of this action is not "that the judgment was wrong," but "that (for a reason which the now plaintiff could not avail himself of against that judgment) the defendant ought not in justice to keep the money." And at Guildhall I declared very particularly, "that the merits of a question determined by the commissioners, where they had jurisdiction, never could be brought over again in any shape whatsoever."

Money may be recovered by a right and legal judgment; and yet

the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defense against the judgment.

Suppose an indorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the indorser, who knew nothing of such payment.

Suppose a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home; or upon the life of a man presumed to be dead, who afterwards appears; or upon a representation of a risk deemed to be fair, which comes out afterwards to be grossly fraudulent.

But there is no occasion to go further; for the admission "that, unquestionably, an action might be brought upon the agreement," is a decisive answer to any objection from the judgment. For it is the same thing, as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement, that the defendant may refund the money he received; or, upon the agreement itself, that, besides refunding the money, he may pay the costs and expenses the plaintiff was put to.

This brings the whole to the question saved at *nisi prius,* viz.: "Whether the plaintiff may elect to sue by this form of action, for the money only; or must be turned round, to bring an action upon the agreement."

One great benefit which arises to suitors from the nature of this action is, that the plaintiff needs not state the special circumstances from which he concludes "that, *ex æquo et bono,* the money received by the defendant ought to be deemed as belonging to him;" he may declare generally "that the money was received to his use," and make out his case at the trial.

This is equally beneficial to the defendant. It is the most favorable way in which he can be sued: he can be liable no further than the money he has received; and against that may go into every equitable defense upon the general issue: he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff, *ex æquo et bono,* is not entitled to the whole of his demand, or to any part of it.

If the plaintiff elects to proceed in this favorable way, it is a bar to his bringing another action upon the agreement; though he might recover more upon the agreement than he can by this form of action. And therefore, if the question was open to be argued upon principles at large, there seems to be no reason or utility in confining the plaintiff to an action upon the special agreement only.

But the point has been long settled, and there have been many precedents; I will mention to you one only, which was very solemnly considered. It was the case of Dutch v. Warren, M. 7 G. 1 C. B. An action upon the case for money had and received to the plaintiff's use.

The case was as follows: Upon the 18th of August, 1720, on pay-

ment of 262*l.* 10*s.* by the plaintiff to the defendant, the defendant agreed to transfer him five shares in the Welsh copper mines, at the opening of the books; and for security of his so doing gave him this note: "18th of August, 1720. I do hereby acknowledge to have received of Philip Dutch 262*l.* 10*s.* as a consideration for the purchase of five shares; which I do hereby promise to transfer to the said Philip Dutch as soon as the books are open, being five shares in the Welsh copper mines. Witness my hand, Robert Warren." The books were opened on the 22d of the said month of August, when Dutch requested Warren to transfer to him the said five shares; which he refused to do, and told the plaintiff "he might take his remedy." Whereupon the plaintiff brought this action for the consideration-money paid by him. And an objection was taken at the trial, "that this action upon the case, for money had and received to the plaintiff's use, would not lie; but that the action should have been brought for the non-performance of the contract." This objection was overruled by the CHIEF JUSTICE, who notwithstanding left it to the consideration of the jury, whether they would not make the price of the said stock as it was upon the 22d of August, when it should have been delivered, the measure of the damages; which they did, and gave the plaintiff but 175*l.* damages.

And a case being made for the opinion of the Court of Common Pleas, the action was resolved to be well brought; and that the recovery was right, being not for the whole money paid, but for the damages in not transferring the stock at the time; which was a loss to the plaintiff, and an advantage to the defendant, who was a receiver of the difference-money, to the plaintiff's use.

The court said, that the extending those actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio,* by reason of the fraud, and bring an action for money had and received to his use.

The damages recovered in that case show the liberality with which this kind of action is considered; for though the defendant received from the plaintiff 262*l.*, 10*s.*, yet the difference-money only, of 175*l.*, was retained by him against conscience; and therefore the plaintiff, *ex æquo et bono,* ought to recover no more; agreeable to the rule of the Roman law: *"Quod condictio indebiti non datur ultra, quam locupletior factus est qui accepit."*

If the five shares had been of much more value, yet the plaintiff could only have recovered the 262*l.* 10*s.* by this form of action.

The notion of fraud holds much more strongly in the present case than in that, for here it is express. The indorsement which enabled the defendant to recover was got by fraud and falsehood for one purpose, and abused to another.

This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much en-

couraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law,—as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore we are all of us of opinion, that the plaintiff might elect to waive any demand upon the foot of the indemnity, for the costs he had been put to; and bring this action to recover the 6*l.* which the defendant got and kept from him iniquitously.

Rule. That the postea be delivered to the plaintiff.[1]

WALKER v. AMES.

2 Cow. (N. Y.) 428.—1823.

On *certiorari* to a Justice's Court. The action was case in the court below, by Ames against Walker; "For that the defendant did fraudulently obtain a judgment, or a certain part thereof, against the present plaintiff, to his damage $25." The defendant pleaded the former suit in bar, which was overruled by the Justice. The fraud complained of was, that Walker, in the suit against Ames, recovered on a book account, and also on a note given by Ames to Walker, on settlement of the same account for the balance thereof. Verdict and judgment for the plaintiff.

Curia.—The judgment must be reversed. This was overhauling the first judgment, and attempting to recover back a portion of it, on the ground that it was not due, and had been unconscientiously recovered. The allegation of fraud does not alter the nature of the case. It is substantially an action to recover back money improperly awarded by a former judgment; and is precisely the case of Marriot v. Hampton (7 T. R. 269). In that case, the defendant had

[1] See critical comment on this case in Carter v. First Eccles. Soc., reported herein at post, p. 537; Sinclair v. Brougham, reported herein at post, p. 632; and "Moses v. Macferlan, Is It Sound Law?" 24 Yale L. Jour. 246.

recovered against the plaintiff for goods sold. The plaintiff had paid him for these goods and taken his receipt; but not being able to find the receipt, at the time of the trial, judgment went against him and he paid the money again. Afterwards, finding the receipt, he brought his action to recover it back. Lord Kenyon says: "If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any person." The case of Cobb v. Curtiss (8 John. 470) is clearly distinguishable. There, the action was founded on an agreement to discontinue the first suit; and the court go upon the ground, that this agreement could not have been set up as a defense to the second. There was nothing to prevent Ames' showing upon the first trial, that the note included the account. If he was not prepared with his proof, it was his misfortune. There would, indeed, *be no end to litigation, nor any security to any person*, if actions like this could be sustained. Judgment reversed.[1]

[1] In Fuller v. Shattuck, 13 Gray (Mass.) 70 (1859), the court says (p. 71): "In any form of action and under any statement of the plaintiff's case, the objections to the maintenance of this claim are equally decisive. It in effect assumes that if a partial payment is made on account of a debt, upon which the creditor afterwards brings a suit and recovers judgment, the debtor can recover back the sum which he paid, by proving that it was not credited to him in computing the amount of the judgment. It is well settled, both upon principle and authority, that no such proof is open to him. The time for it has gone by. He has had his day in court. It was the very thing he might and should have proved in the suit in which the judgment was recovered. To allow him to bring an action, and support it by such proof, would be to allow him to try over again one of the issues decided by the judgment; which the law does not allow. If a part of the debt had been paid before the judgment was recovered, then the whole was not due. But the judgment is the solemn adjudication of the court, between these parties, that the whole was due. Each party had full opportunity to be heard, and there must be some end of litigation."

But see Snow v. Prescott, 12 N. H. 535 (1842). Here the plaintiff sold and delivered a plough and anvil to the defendant, the price of which the defendant agreed to endorse upon a note which he held against the plaintiff. He did not make the endorsement as he had agreed to, and subsequently recovered judgment against the plaintiff for the whole consideration of the note, in a suit thereon by default, and enforced its payment by an execution, and it was held that the plaintiff might recover the price of the articles. in an action for goods sold and delivered; and the case of Tilton v. Gordon, 1 N. H. Rep. 33, *contra*, was overruled. It was held that the plaintiff may recover without re-examining the merits of the judgment, as his right of action depends, not upon the rendition of the judgment, but upon the sale and delivery of the articles, and upon the defendant's failure to make the indorsement. The court says (p. 542): "The plaintiff in this case is entitled to recover. He sold and delivered the plough and anvil to the defendant, who agreed to indorse their price upon the note. This agreement he failed to perform, and the plaintiff may consider this failure as a rescission of the agreement. The defendant, then, has received property of the plaintiff for which he has not paid. He cannot avail himself of his omission to make the indorsement as a defense to this suit, and the plaintiff may now recover the price of the property, in this action."

CARTER v. FIRST ECCLESIASTICAL SOCIETY OF CANTERBURY.

3 Conn. 455.—1820.

Peters, J.—It appears by the motion, that on the 21st day of January, 1811, the defendants agreed, by vote, to sell the pews in their meeting-house, prescribing the form of conveyance to be given, and the security to be taken, and appropriated the avails, so soon as five thousand dollars should be raised, if raised before the 1st day of September then next, as a *perpetual, permanent and invariable fund,* for the maintenance of the gospel, and an orthodox minister; that the requisite sum was seasonably raised, by a sale of the pews, whereof the plaintiff became a purchaser of one, and therefor gave his note, dated March 29, 1811, for one hundred and fifty dollars, payable to the treasurer, on the 1st day of April, 1812, with interest annually; which interest, amounting to thirty-six dollars, was regularly paid, by the plaintiff, until the first day of February, 1816, when the note was sued, judgment obtained and execution taken out, and satisfied on the real estate of the plaintiff; that in October, 1812, an orthodox minister was settled in the society, and the interest of the fund duly applied to his support, until January 15, 1818, when the defendants voted to change the mode of supporting the minister, and give up the notes received for pews sold, on the purchasers paying the interest accrued, and releasing the pews to the society.

Upon these facts, the plaintiff, by the two first counts in his declaration, claimed to recover the amount of the execution, obtained against him by the defendants, and the sheriff's fees thereon; and by the third count, the amount of interest paid on his note. But the court directed the jury to find for the defendants.

To entitle the plaintiff to a verdict, the case of Moses v. Macferlan, 2 Burr. 1005, must be revived. But the authority of that case has been too often shaken to have any weight at the present day: O'Harre v. Hall, 4 Dall. 340. Though the principles relating to *indebitatus assumpsit,* so luminously illustrated in Moses v. Macferlan, have been universally recognized, their application to that case has been generally reprobated by the bench as well as the bar. In that case, money obtained from the plaintiff, pursuant to a judgment of a court then in force, was recovered back, on proof of facts *dehors* the record, whereby it appeared, that the defendant, *ex aequo et bono* ought not to retain it. This has been considered as an overhaling or impeaching of a judgment, indirectly. But Lord Mansfield himself, in that very case, informs us, "that the merits of a judgment cannot be over-haled by an original suit, either at law or in equity. Till the judgment is set aside, or reversed, it is conclusive as to the subject matter of it, to all intents and purposes." P. 1009. How, then, could it be against conscience for Macferlan to retain this money, thus awarded him, by a court of justice, merely because

he had violated his agreement, for which he was liable in damages, but not to refund the money he had recovered. Well might he have said *"Non in haec foedera veni."*

In Marriott v. Hampton, 7 Term Rep. 269, where the plaintiff, having paid a debt, and taken and *lost* a receipt, was sued, and obliged to pay it again, but afterward finding the receipt, he brought *assumpsit* for the money; Lord KENYON was of opinion, that after a recovery by process of law, there must be an end of litigation; that money paid under such process, could not be recovered back, how unconscientiously soever retained.

The case of Phillips et al. v. Hunter et al., in err., 2 H. Bla. 402, has been supposed to establish a contrary doctrine. But that case was decided on the principles of the bankrupt laws, regardless of Moses v. Macferlan. Lord Ch. J. EYRE thought that no other decided case countenanced such an action, and combated it forcibly and conclusively. "Shall the same judgment," said that learned judge, "create a duty for the recoverer, upon which he may have debt, and a duty against him, upon which an action for money had and received, will lie? This goes beyond my comprehension. I believe that judgment did not satisfy Westminster Hall at the time. I never could subscribe to it; it seemed to me to unsettle foundations." P. 416. Though this was the opinion of one judge only, it has since been quoted with approbation, by Ch. J. KENT, on delivering the opinion of the court in Smith v. Lewis, 3 Johns. Rep. 157, and following *haud passibus aequis* the example of Lord ELLENBOROUGH, in Imly v. Ellefsen, 2 East 453, and of the supreme court of New York, in Smith v. Spinola, 2 Johns. Rep. 198, I have no hesitation in saying that it is the better opinion, and is to be adopted as law.[1]

But this is not the only objection to the plaintiff's recovery. The defendants have received no money as the avails of their judgment: they have only acquired a title to real estate, of which the plaintiff may divest them, on a proper application to the proper court. This is a novel attempt to convert land acquired by execution into money had and received; and it may be added, as a conclusive answer to the plaintiff's claim, that he retains the pew for which the note was given; the consideration of which has not failed, and, therefore, could not be recovered back, even if it had been in money.

With respect to the money claimed in the third count, it was vol-

[1] Accord, Kirklan & Hickson v. Brown's Adm'rs, 4 Humph. (Tenn.) 174 (1843), the court saying: "In the great case of Moses v. Macferlan, 2 Burr. 1005, the *ex æquo et bono* principle of the action of assumpsit, announced by Lord MANSFIELD, as well as the facts and circumstances of that case, might seem to give some ground for the maintenance of a suit like this. But of that case, as well as of some others determined by Lord MANSFIELD, it may be said, *materiam superavit opus.* The great principles marked out and developed by his original and powerful intellect remain to guide us; but their framework, the facts and circumstances to which they were appended, not always appropriate, have in some instances given way and ceased to sustain them."

untarily paid by the plaintiff, on his own note, then justly due, and has been appropriated and applied, by the defendants, to the use for which it was intended by the plaintiff.

I would not advise a new trial.

The other judges were of the same opinion, except HOSMER, Ch. J., who, not having heard the case argued, gave no opinion.

HIPP v. CRENSHAW.

64 IOWA 404.—1884.

REED, J.—At the December term, 1883, an opinion was filed in this case affirming the judgment of the circuit court. Appellant thereupon filed a petition for a rehearing, which was sustained, and the cause was reargued by counsel. Since the final submission of the cause, plaintiff has filed a motion to dismiss the appeal, on the ground that defendant has fully performed the judgment from which the appeal was taken. It is shown in support of this motion, that since the opinion was filed defendant has paid to the clerk of the circuit court a sum of money which both he and the clerk supposed was the full amount of the judgment and costs, but which was, in fact, a few dollars less than such amount, and that plaintiff's attorney has received the amount and entered satisfaction of the judgment. Defendant has filed his affidavit in resistance of the motion, in which he swears that his financial circumstances were such that he was compelled to procure a loan of money, and that, to enable him to procure such loan, he was compelled to give a mortgage on certain real estate to secure the same, and, as the judgment was a lien on said real estate, he was also compelled to remove such lien before the parties from whom he had arranged to procure the loan would consent to accept the mortgage as security therefor.

His claim is that the payment of the money to the clerk was not voluntary. But we think it very clear that this position is not tenable. A payment under such circumstances is not a payment under *duress*. All that can be claimed is that defendant found it to his advantage to discharge the lien of the judgment, and paid the money for that purpose, and to enable him to procure the loan. We think the motion to dismiss the appeal must be sustained. But, as some members of the court are not satisfied with the conclusion reached by the former opinion, it will be withheld from publication.

Dismissed.

CLARK & CLARK v. PINNEY.

6 Cow. (N. Y.) 297.—1826.

Assumpsit for money had and received.

On the trial, the plaintiff's counsel offered in evidence the record of a judgment in the Onondaga Common Pleas of the term of February, 1822, in favor of the defendant against the plaintiffs, for $193.11; a *fi. fa.* indorsed satisfied by the sheriff, June 21, 1822, except sheriff's fees; that the execution was paid by a note of Walker & Clark, by which they promised the defendant to pay him $181.27 on the 1st day of February, 1823, with interest, provided the judgment in the Common Pleas should not be reversed before that day. That this was received as and toward payment of the judgment by Pinney and his attorney. The counsel also offered the record of a judgment for $216.73 in the Onondaga Common Pleas on this note, recovered at May term, 1823, and an execution returnable at the next August term, which had been paid before the return day, and was returned by the sheriff satisfied. They also offered an exemplification of a judgment record in the supreme court in favor of the present plaintiffs against the present defendant, whereby it appeared that the judgment first above mentioned had been reversed on a writ of error, at the October term, 1824. All these facts were admitted by the defendant's counsel, on whose motion the judge nonsuited the plaintiffs, with leave to move to set aside the nonsuit, and for a new trial.

Curia, per Savage, C. J.—The important question in this case is, whether *indebitatus assumpsit* for money had and received lies to recover money paid on an execution upon a judgment which was afterward reversed.

The general proposition is, that this action lies in all cases where the defendant has in his hands money which, *ex aequo et bono,* belongs to the plaintiff. When money is collected upon an erroneous judgment which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible, that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him. The only question is, whether this be the proper remedy.

The cases referred to by counsel do not fully decide the point; nor have I found any case where this very point has been decided except Green v. Stone, 1 Har. & John. 405. It was raised in Isom v. Johns, 2 Munf. 272. There the defendant had been plaintiff in a former action; recovered judgment, and issued execution, upon which the defendant's property was sold by the sheriff. On the argument, most of the English cases which are now cited were referred to. The court decided against the plaintiff on the ground that the money did not appear to have come to the defendant's use;

not denying the doctrine, however, that, if the defendant had received the money, the plaintiff might recover it in this action.

In Green v. Stone this very point was decided in favor of the plaintiffs.

The principle in question is supposed to have been acted on in Feltham v. Terry, Lofft 207, which was an action for money had and received by the church wardens against the overseers of the poor, for money levied by the latter, on a conviction of one of the former, which was subsequently quashed. The court held the plaintiff might sue for the money collected by a sale of the property; or, by bringing trespass, he might have recovered the value of the property. This conviction, I apprehend, must have been irregular; otherwise the court would not have said trespass might have been brought. Trespass surely would not lie for collecting the amount of a judgment which was merely erroneous. In that case, therefore, the court must have acted on the principle that the money was collected by a void authority. The authorities are clear and abundant that, in such a case, *indebitatus assumpsit* lies. 1 Bac. Abr. 261; Newdigate v. Davy, 1 Ld. Raym. 742.

In the case of Mead v. Death & Pollard, 1 Ld. Raym. 742, it was decided that money paid upon an order of the Quarter Sessions could not be recovered back, though the order had been quashed on *certiorari*. And TRACY, Baron, before whom the cause was tried, compared it to the case where money is paid upon a judgment which is afterward reversed for error, in which case *indebitatus assumpsit* will not lie. No reason is given why this action will not lie; nor is any case referred to in support of the *dictum*. It is shown, however, that in the English courts the proper remedy, upon the reversal of a judgment, is a *scire facias quare restitutionem non*, upon which the party recovers all that he has lost by reason of the judgment. Com. Dig. (3 B. 20) Cro. Car. 699. And if it appear on the record that the money is paid, restitution will be awarded without a *scire facias*, 2 Salk. 588.

Cases have been cited in which it is said that this action does not lie to recover money collected under legal process afterward vacated, which is true as applied to those cases; but the principle is not applicable in this case.

Upon the whole, my view of the question is this: the general principle is, undoubtedly, in favor of sustaining the action. Isom v. Johns, decided by the court of appeals of Virginia, is a plain recognition of the principle as governing this very case; and Green v. Stone is an authority in point. These are opposed only by a *nisi prius* decision, at a time when the action for money had and received had not come into general use. I am inclined to sustain the action. The inclination of courts is to extend the action for money had and received. It is not denied that the plaintiff is entitled to some remedy for the money, though it was taken from him by process erroneous merely. Then, why turn him round from this simple ac-

tion to the antiquated remedy by *scire facias?* I do not think the purposes of justice require it.

It is also contended that the facts in this case do not amount to a payment of money to the defendant. A note was received by the sheriff as payment of the execution, by the direction of the plaintiff and his attorney. And the execution was returned satisfied. Nay, more; a judgment has been obtained; and the money actually paid upon that note. To what would the plaintiffs be restored on a *sci. fa.?* To the money paid by the note, as money. Restitution could be of nothing else. The difficulty in Isom v. Johns was that the sheriff could not be held the plaintiff's agent. The facts show him to be so in this case.

In my opinion there should be a new trial.

New trial granted.[1]

DUNCAN v. WARE'S EXECUTORS.

5 S. & P. (Ala.) 119.—1833.

John Duncan, for the use of another, declared against Ware, Cowles and Robertson, executors of the last will and testament of Robert Ware, in assumpsit. Judgment for defendants.

In 1826, Robert Ware, the testator, recovered a judgment in the circuit court of Montgomery county, against Lawrence, Rapelye & Co., of New York, by process of foreign attachment, for the sum of $2,032.29; at the same time, the said Robert Ware obtained judgment against John Duncan, the plaintiff, *as a garnishee* in said attachment, for the sum of $377—which was rendered upon the answer of Duncan, under oath, acknowledging his indebtedness to the defendants in the attachment, in that amount; that said Duncan paid to the said Ware, testator, the said amount under execution. That afterward, and since the payment by Duncan, the judgment rendered in the attachment cause, against Lawrence, Rapelye & Co. was reversed. It was admitted, Lawrence, Rapelye & Co. owed to the said testator the amount of the said judgment, so rendered in his favor; and that the said sum of $377 had not been paid by Duncan, in any other manner than as aforesaid. Under this state of

[1] Accord, see Scholey v. Mumford, ante p. 475, note.

In Mann and another v. Ætna Insurance Co., 38 Wis. 114 (1875), "plaintiffs covenanted with A., S. & Co., for value, to discharge all indebtedness and liabilities of the latter firm, indemnify it against an action by the present defendant against it, then pending in New York, and pay any judgment which should be rendered against it therein. On a judgment rendered against A., S. & Co., in that action, this defendant recovered a judgment in Wisconsin against that firm, which was paid by the plaintiffs, but afterwards vacated on their motion, for the reason that the New York judgment had been reversed. *Held*, that such payment by plaintiffs was not a ***voluntary*** one, but one to which they were ***bound by their covenant;*** and they may recover from this defendant the amount so paid." (Syllabus.)

facts, the present action was brought to recover the amount paid by the garnishee, as aforesaid.

TAYLOR, J.—* * * * Assumpsit is an equitable action—admitting every defense, with but few exceptions, to which the defendant is entitled, in equity and good conscience. As between the defendants and Lawrence, Rapelye & Co., in equity and good conscience, the defendants certainly are not bound to refund the money. By a judgment which was irregular, and for that reason reversed, the amount of a debt, justly due, was recovered and paid to the decedent. In this situation, he was not authorized to renew his suit; his debt was paid, and if Lawrence, Rapelye & Co. were permitted to recover against him, would it not place him in a worse situation than if the money had not been collected? He must wait until they recover from him before he sues them; or, without suit, he must refund to them, money, to which he is justly entitled, and which they owe him, that he may be authorized to institute a suit against them, and recover the same money back again. This cannot be tolerated. If an irregular judgment has been obtained, and the money recovered for a debt justly due, proof that the debt was due affords a good defense in an action of assumpsit brought to recover the money back. 1 Harris & Johns. 405.

But the plaintiff paid as garnishee: does this place the defendants in a worse situation? Does the reversal of the judgment render the garnishee liable to the defendant in the attachment? If the reversal had taken place upon the merits, showing that no debt was due from the defendants to the attachment, it is doubtful whether a payment made by the garnishee before that reversal would authorize him to maintain an action. His payment under the judgment would probably be considered a discharge of the debt to his creditor; and, if that creditor did not owe the plaintiff in the attachment, he should resort to him, and the garnishee would probably be discharged. A debt due from a garnishee, we are inclined to think, should be considered, in all respects, as property of the defendant, especially after that debt has been paid, under the process of the court. But where the debt is confessedly due from the defendant in attachment to the plaintiff, we have no doubt, a payment by the garnishee, of the judgment recovered against him as such, fully discharges him from his creditor; and, therefore, that, in this case, Lawrence, Rapelye & Co. have no claim against the plaintiff.

The judgment must be affirmed.[1]

[1] Accord, Teasedale v. Stoller, 133 Mo. 645 (1896), an action to recover money paid on a judgment afterwards reversed, the court saying (p. 652): "The justice of the defendants' original claim is not only shown by the conceded facts of this case, but the justice of the judgment set aside was established in the judgment of this court upon appeal therefrom. The defendants lost the benefit thereof merely by "a slip" in their own procedure, and ought not to be compelled to refund the money which they rightfully received, and which, in equity and good conscience, they may retain." (But it is held in Dupuy v. Roebuck, 7 Ala. 484 (1845), that "it is not permissible to justify

CAROLINE GOULD v. McFALL.

118 Pa. St. 455.—1888.

On November 14, 1880, Robert McFall recovered a judgment against William L. Gould and Caroline Gould, his wife, for groceries and provisions furnished. Mrs. Gould took an appeal to the court of common pleas. On October 26, 1883, the cause being called for trial, the defendants did not appear, and judgment was entered against them for $25.26, with interest from July 3, 1880. Afterward executions were issued, a levy made upon real estate of Mrs. Gould, and a sheriff's sale advertised for the first Monday of April, 1885. On the Thursday before the sale was to be had Mrs. Gould, with an attorney, met the plaintiff's attorney at sheriff's office and paid the debt, interest and costs, directing the writ to be returned, money made. In the meantime, on January 31, 1885, the attorney of record for the defendants had taken a writ of error to the judgment entered in the court of common pleas, which judgment, on January 4, 1886, was reversed and set aside by this court so far as it affected Mrs. Gould; reported: Gould v. McFall, 111 Pa. 66. Subsequently, on petition, a rule was granted upon the plaintiff to show cause why a writ of restitution should not issue, returnable to January 23, 1886.

An answer having been filed, testimony was taken before an examiner, from which it appeared that the debt, interest and costs upon the writ of execution had been paid by Mrs. Gould, as before stated; that the purpose in view was to save her house and lot from a sale by the sheriff, and enable her to make title for the same to one Scott, to whom she had contracted to convey it. Her conveyance to Scott was made in a week or two after the payment. There

the retention by showing that the party has another cause of action in which he will be entitled to recover as much as he received and retains.")

Contra, Bickett v. Garner, 31 Ohio St. 28 (1876), where the court said: "When the erroneous judgment was reversed, the plaintiff in error was entitled to all that he had lost thereby. Tidd's Pr. 1186; Evans v. Stephens, 26 N. H. 117. * * * Notwithstanding the fact that the judgment that had been reversed may have been just and that Garner on another trial would probably again obtain judgment against Bickett. * * * If the court was required to listen to suggestions of this kind it might be compelled in every instance to investigate the merits of the cause on a motion for restitution." In accord with this view are: Hier v. Anheuser-Busch Assoc., 60 Nebr. 320 (1900); Conover v. Scott, 11 N. J. L. 400 (1830); and Florence Cotton Co. v. Louisville Banking Co., 138 Ala. 588 (1903), not approving Duncan v. Ware's Ex'rs, supra.

was testimony adduced on the part of the respondent to the rule that when the payment on the writ was made, Mrs. Gould engaged to stop proceedings on the writ of error; this, however, was denied on the part of the petitioner.

Mr. Justice PAXSON.—This was a rule to show cause why a writ of restitution should not issue. * * * *

The payment was voluntary. The money was paid by Mrs. Gould's attorney to the attorney of the plaintiff in the writ. It is true there was an execution out and a levy upon her real estate. A sale upon this execution, however, would not have passed the title. It had issued upon a judgment which this court, per GORDON, J., has declared void. In Colwell v. Peden, *supra* (3 Watts 327), where the subject was carefully considered on principle and authority, it was ruled that an action cannot be maintained to recover back money paid under an impending distress not attended with oppression or an abuse of the remedy, but made in good faith for rent erroneously supposed to be in arrear. And the general principle appears to be that money voluntarily paid upon a claim of right cannot be recovered back, however unfounded such claim may afterward turn out to be. We are not now considering the line of cases where the process of law has been abused for the purpose of extortion, but where it was used *bona fide* to enforce what was supposed to be a right. The suit in this case was to recover for certain groceries sold by McFall, the plaintiff, to Mrs. Gould, a married woman, for the support of herself and family. They were necessaries, and, if actually sold as alleged, the plaintiff would have had a right to recover, had he made the necessary proof. He took a judgment by default, and this coúrt decided that such proof had not been made and reversed the judgment. We see, however, no equity which should move us to award restitution.

We see no hardship in the case, and if there were, we prefer to hold to well established principles. This was a voluntary payment and restitution must be refused. Rule discharged.

---

ii. *Recovery of Taxes Paid.*

PEYSER v. MAYOR, ETC., OF NEW YORK.

70 N. Y. 497.—1877.

THIS action was brought to recover back moneys alleged to have been paid upon an alleged assessment. The complaint alleged, in substance, that in March, 1869, defendant imposed and put on record what appeared to be, and what defendant alleged and claimed was an assessment on a lot owned by plaintiff, in the city of New York, for a local improvement; that said assessment thereby be-

came and was a lien and encumbrance on said lot, and plaintiff was compelled to and did pay the amount of said assessment, he supposing that said apparent assessment was legal and valid; that in October, 1869, the Supreme Court, on motion, set aside the assessment, and adjudged the same to be void, and that the comptroller of the city refused to pay back on demand the sum so paid. The answer admitted that the assessment was duly imposed and paid, and alleged that such payment was voluntarily made. Upon the trial, the petition upon which the application was made to vacate the assessment, and the order vacating, were given in evidence. This alleged, as the ground of illegality, that there was included in the amount for which the assessment was made the cost of works not authorized by the ordinance under which the assessment was laid. The order recited that it satisfactorily appeared that such irregularity took place. It also appeared that in July, 1869, plaintiff received official notice of the confirmation of the assessment and a demand of payment on or before July 27th; that he thereupon paid the same, under protest.

Folger, J.—The reversal of the assessment and the setting it aside as illegal and void, is conclusive that the money obtained upon it by the defendant was got from the plaintiff without primary right. In such case the general rule is, that the money *ex aequo et bono* belongs to the plaintiff, and is held by the defendant for his use. The law raises an obligation on the part of him who has received the benefit of it to make restitution. It is upon this principle, that an action is maintainable to recover back money collected in satisfaction of an erroneous judgment which has been reversed after payment made. Bank of U. S. v. Bank of Washington, 6 Peters 8; Sturges v. Allis, 10 Wend. 355; Clark v. Pinney, 6 Cow. 297. But in actions to recover back money paid in such case another principle comes in, and must be observed. That is, that the payment must be involuntary, which is tantamount to saying that it must be compulsory from coercion either in fact or by law. The reason of this principle is, that a person shall not be permitted, with the knowledge that the demand made upon him is illegal and unfounded, to make payment without resistance, where resistance is lawful and possible, and afterward to choose his own time to bring an action for restoration, when, perchance, his adversary has lost the evidence to sustain his side. I have spoken of coercion in fact and coercion by law. By the first I mean that duress of person or goods, where present liberty of person or immediate possession of goods is so needful and desirable, as that an action or proceeding at law to recover them will not at all answer the pressing purpose. Duress of person is exemplified in Forshay v. Ferguson (5 Hill 154); Eadie v. Slimmon (26 N. Y. 9). The cases of Maxwell v. Newbold (18 How. (U. S.) 511), and Harmony v. Bingham (12 N. Y. 99), illustrate what is duress of goods. It may be well to say, that there can be no pretense in this case of a coercion in fact. There was no taking or threat of taking goods. The oral protest was of

no import, save to show that there was not an assent to the proceedings. Flower v. Lance, 59 N. Y. 603, 610. Coercion by law is where a court, having jurisdiction of the person and of the subject matter, has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it, when execution is attempted he may as well pay the amount at one time as another and save the expense of delay. It may be well to say that if the judgment is not afterward reversed, but is invalid for any collateral reason, or the process issued upon it is illegal, payment with knowledge of the fact would perhaps be voluntary, which seems a sound distinction taken by EMOTT, J., in Lott v. Swezey, (29 Barb. 87-92). To such case of coercion by law, as is above given, are to be added those quasi adjudications of inferior tribunals, such as assessors of taxes or assessments; where their proceedings are regular on their face, and on presentation make out a right to have and demand the amount levied, and to collect it in due course of law by sale of goods or municipal lease of real estate. Unless void on their face, they have the force of a judgment; the party is legally bound to pay, and has no lawful mode of resisting. The only remedy is a reversal of the adjudications. Until reversed they give the collector of the tax the right to take and sell goods, and the assessment remains a *prima facie* valid lien upon real estate. Bank of Commonwealth v. The Mayor, 43 N. Y. 184-8.

There is no clashing here with the case of The N. Y. & H. R. R. Co. v. Marsh (12 N. Y. 308). In that case there was wanting another element which is assumed to exist in the cases above supposed. There had been no reversal of the assessment of tax in that case. There had been no alteration of the rights and positions of the parties, and the action was brought upon the same state of facts as existed when the payment was made. Besides, in that case, the collector did not assert a right to seize property then and there. There was no taking, nor imminent danger thereof. He was out of his bailiwick, which fact was as well known to the plaintiff as to him, and at the time payment was made, as when action as commenced. Nor is it the same as Fleetwood v. City of New York (2 Sandf. 475). There it was apparent upon the face of the proceedings that there was no foundation for them, no ordinance having been adopted for laying the assessment. The owner of the land assessed could always have relied upon this as a defense to an action to dispossess him. The lessee of the city would have needed to show and would have failed to show an ordinance for the assessment. The assessments were not a cloud upon his title, warranting an action to remove an apparent lien. Marsh v. City of Brooklyn, 59 N. Y. 280; Washburn v. Burnham, 63 id. 132. To warrant an action to recover back money paid by coercion of law upon a judgment, or tax levied, or assessment laid, it must appear that the judgment of proceedings were *prima facie* regular, so as not, themselves, to furnish evidence of their own

invalidity; and it must also appear that the rights and positions of the parties have been changed since the payment was made, as by a reversal for error or a setting aside for irregularity or illegality. By the setting aside of the assessment, in the case in hand, the last of the requirements is made out. We must look into the case to see if the first is. The complaint alleges that the defendants imposed and put upon record what appeared to be, and what defendants claimed was an assessment on the plaintiff's land, and that the same became, and was an apparent lien and incumbrance thereon. The answer admits that the assessment was duly imposed pursuant to law. The petition for the vacating of the assessment, which was given in evidence, alleges as the ground of illegality that there was included in the amount the cost of works not authorized by the ordinance, in pursuance of which the assessment was laid. The order of the court setting aside the assessment recites that it satisfactorily appears that such irregularity took place. This is sufficient to show that the illegality of the assessment consisted in something *aliunde* the record which would be produced by a municipal lessee to establish his right to possession of the lot assessed. It was in a fact of which the plaintiff would have needed to make proof on his part to rebut the *prima facie* case made against him. It thus appears that the plaintiff fulfilled the other requirement of a payment involuntarily made.

It follows that the complaint was erroneously dismissed at the trial, and the judgment should be reversed.

All concur. Judgment reversed.[1]

[1] In Redmond et al. v. Mayor, etc., 125 N. Y. 632 (1891), the court says (p. 636): "So, where an assessment is paid which, upon its face, carries the notice of its illegality and consequent invalidity, and no duress is resorted to for its collection by the authorities, its payment by the property owner would be voluntary in the eye of the law and its restoration denied. Fleetwood v. City of New York, 2 Sandf. 475; Peyser v. Mayor, 70 N. Y. 496; Phelps v. Mayor, 112 Id. 216. But the principle upon which such payments are deemed voluntary extends to cases where, without the impress of illegality upon their face, assessments are paid with knowledge, actual or constructive, of the facts which make them invalid claims of the municipality. That should be quite obvious; for the principle underlying the right to compel a restoration of the moneys paid is that the debtor was ignorant of the existence of the facts which would have precluded his creditor from maintaining his demand at law, or enforcing his lien against his defense. The court should deny a claim for the repayment of moneys in such cases, unless it appears in proof that the parties charged with their payment were ignorant of the facts constituting the illegality of the assessments, and paid them, when demanded, and under circumstances exhibiting such good faith in the matter as to make it appear that they acted under a moral coercion, or else it should be evident that the payment was involuntary and compelled by some duress."

TRIMMER v. CITY OF ROCHESTER.

130 N. Y. 401.—1892.

THIS action was brought to recover back moneys paid upon alleged illegal assessments for street improvement. May 30, 1865, the common council of the city of Rochester, pursuant to chapter 143 of the laws of 1861, the city charter, confirmed an assessment of $30,830, for curbing and paving Oak street, between Allen and Lisle streets, the sum being assessed upon property benefited by the improvement. One-third of the assessment became due August 30, 1865, one-third May 30, 1866, and one-third May 30, 1867. The last two installments bore interest at the rate of 7 per cent. from May 30, 1865. Among other property assessed was a lot belonging to Thomas Brady, upon which there was levied $492, one-third of which, $164, was payable August 30, 1865, one-third May 30, 1866, with interest from May 30, 1865, and one-third May 30, 1867, with interest from May 30, 1865. August 30, 1865, Brady paid $164, and April 19, 1866, $174.15, the amount of the second installment with interest. Prior to Febraury 21, 1888, Brady's right to recover the sums so paid by him was assigned to the plaintiff, who, on the date mentioned, demanded payment of the defendant of the sums, and February 23, 1888, brought this action to recover the amounts paid with interest from the dates of payment. July 18, 1867, William E. Hassen and others, Thomas Brady not being a party, brought an action to set aside the assessment against their properties upon the ground that certain realty benefited by the improvement had been omitted from the roll. September 9, 1882, a judgment was recovered in the action, adjudging that the assessments against the realty of the plaintiffs in that action were illegal and void by reason of such omission, and the city and its officials were restrained from collecting the assessments from the plaintiffs or out of their property, 6 Lans. 185; 65 N. Y. 516; 67 id. 528. Further facts are stated in the opinion.

FOLLETT, Ch. J.—The taxing officers of the defendant omitted from the assessment roll realty benefited by the improvement, and for this error assessments against the taxpayers who brought actions to set them aside were adjudged to be illegal. Hassen v. City of Rochester, 65 N. Y. 516; 67 id. 528.

There is a broad distinction between an assessment which is illegal by reason of the existence of some fact outside the record and one void on the face of the record, for lack of jurisdiction of the person or property, or by reason of the unconstitutionality of the statute under which the assessment is made. In the latter case, if money is compulsively obtained it may be recovered from the municipality in an action at law brought by the wronged taxpayer. But in case money is collected under an illegal assessment, it cannot be recovered until the assessment is set aside. Horn v. Town

of New Lots, 83 N. Y. 101; Purssell v. Mayor, etc., 85 id. 330; Strusburgh v. Mayor, etc., 87 id. 452; Bruecher v. Village Port Chester, 101 id. 240; Jex v. Mayor, etc., 103 id. 536. The rights of persons from whom money is collected under such assessments are like those of persons from whom money is collected under judgments void; for example, for lack of jurisdiction, and those which are reversible for error. Money collected under void judgments may be recovered without first setting them aside, but that collected under judgments erroneously obtained cannot be until they are reversed.

It is agreed that the assessment against the realty of the assignor of the plaintiff, and on account of which the money sought to be recovered in this action was paid, has not been set aside, nor have any proceeding or actions been instituted for such purpose. The judgment in Hassen's case did not set aside all of the assessments, but only those against the property of the plaintiffs in that action, and the assessment against realty of the assignor of the plaintiff was not affected or invalidated by that judgment, and until it is set aside no action can be maintained to recover the sums paid under it. Matter of Delancey, 52 N. Y. 80; Wilkes v. Mayor, 79 id. 621; Purssell v. Mayor, etc., 85 id. 330; Chase v. Chase, 95 id. 373.

The foregoing cases arose under special statutes regulating the remedies of taxpayers in cases of illegal assessments in the city of New York (C. 338, L. 1858; C. 312, L. 1874; C. 550, L. 1880). But Moore v. City of Albany (98 N. Y. 396), did not arise under a statute affording aggrieved taxpayers special remedies, and it was there held that in case all the assessments on the roll were illegal for a common cause, not appearing on the face of the roll, or on the record on which it rested, a judgment vacating an assessment in favor of one taxpayer did not vacate the assessments against the others. Reid v. Bd. Super. Albany Co., 128 N. Y. 364.

The result is that the plaintiff failed to establish a cause of action for the recovery of the money paid, and the complaint was rightfully dismissed. These views render it unnecessary to consider the question of the effect of the statute of limitations.

The judgment should be affirmed with costs.

All concur. Judgment affirmed.

MAYOR AND ALDERMEN OF JERSEY CITY v. RIKER.

38 N. J. L. 225.—1876.

On rule to show cause.

The plaintiff was assessed for the benefit to his property in Jersey City, by the construction of a sewer, in the sum of $810.57. This assessment was paid by him, and was subsequently set aside on *certiorari* in the supreme court. A reassessment of the expenses of this sewer was then made by the commissioners appointed under

the act of 1873, p. 442, such reassessment amounting to the sum of $333.73. This suit was brought to recover the difference between the sum paid and the amount thus reassessed. A verdict was taken for the plaintiff, and this motion was to set it aside.

Beasley, Chief Justice.—The principal objection to a recovery in this case is, that the plaintiff, having voluntarily paid the tax assessed upon his property, cannot maintain a suit for reimbursement. The general doctrine thus invoked is indisputable. There are a multitude of cases to the purpose, that when money is demanded as a legal right, and it is paid without compulsion, and with a full comprehension of the facts, the money so paid cannot be reclaimed by a suit at law. The reason of this rule is, that the party paying had an opportunity to dispute the claim, and that having waived it at his own volition, it is impolitic to permit him to overhaul the transaction by an aggressive action. The doctrine is intended to be repressive of litigation, and is promotive of the policy expressed in the maxim, "*Interest republicae ut sit finis litium.*" The principle is forcibly stated by Mr. Justice Gibbs in the well-known case of Brisbane v. Dacres, 5 Taunton 152. His language is: "We must take this payment to have been under demand of right, and I think that where a man demands money of another, as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid the sum, he never can recover back the sum he has so voluntarily paid." Many decisions of like import can be found by referring to the notes in illustration of the judgment in the case of Marriot v. Hampton, 2 Smith's Lead. Cas. 400.

Nor are adjudications wanting which have enforced this rule, in its full rigor, in cases of payments of taxes which had been irregularly or illegally assessed. Chief Justice Shaw, in the case of Lincoln v. Worcester, 8 Cush. 55, declares that these are the three following requisites to a right to reclaim the money paid by force of illegal taxation: First, the authority to levy the tax must be wholly wanting; second, the money sued for must have been received by the corporation for its own use; third, the payment must have been made upon compulsion, and not voluntarily. Judge Dillon, in his Treatise on Municipal Corporations, says that unless these conditions are all present, payment under protest will not give a right of recovery. (Vol. 2, p. 857.) This learned author cites in his notes, in corroboration of his views, a lengthened line of concurring decisions.

But the doctrine thus established is not applicable to the present case. The plaintiff does not claim a right of action simply on the ground that he has paid an illegal tax. If such were his attitude the adjudications cited would defeat a recovery. But the suit does not rest on that basis. In this instance the authority to levy the tax was not wholly wanting, and the payment, in the legal sense, was voluntary; and under either of these conditions the law refuses to raise an implied promise to refund the money paid. Had this suit been brought upon the payment of the tax, and before any change in the

situation had occurred, the case would have been the ordinary one presented in the reports and ruled by the decisions. But that is not so; there is a new element here, and that is, the tax which was paid has been set aside. The consequence is the payment has nothing, either in theory or in fact, to rest upon. The party is debarred from his action after a voluntary payment, because, of his own motion, he abandons his defense to the claim; this the present plaintiff did not do; on the contrary, he pushed his defense to a successful result. The payment of the tax in this instance has not added, in the least degree, to the litigation, and public policy, therefore, does not require a frustration of this procedure. The assessment being vacated by direct judicial action, the law raises an assumption to refund the money which can no longer be honestly retained. An assessment in this respect is analogous to a judgment, and when a judgment is reversed the defendant is restored, as nearly as practicable, to his original condition, and for this purpose a writ of restitution goes. In the case of Close v. Stuart, 4 Wend. 98, it is said: "The right of the plaintiff to the costs in error, and to a return of the money becomes perfect by the reversal of the judgment," and it was consistently held that the money so due would form the subject of a set-off. In this court, upon reversals of judgments, restitution has been repeatedly ordered without regard to the fact whether such judgments have been voluntarily paid or not. Randolph v. Bayles, Penn. 52; Anonymous, Ib. 900; McChesney v. Rogers, 3 Halst. 335; Scott v. Conover, 5 Halst. 61. The principle of this course of law is, that after the judgment is annulled the money paid upon it is due to the defendant *ex aequo et bono,* and that there is no paramount inconvenience in allowing its reclamation. Certainly a tax assessment cannot be put upon higher ground; upon its vacation the money paid cannot, in good conscience, be retained by the public. In the present instance the defendant has not a particle of right to the money in question; it is due to the plaintiff according to the principles of common honesty, and it is, therefore, not to be regretted that the attempt to withhold it by the *summum jus* has failed.

The other questions raised upon the argument have been examined, but they do not appear to me to be of any weight.

The rule should be discharged.

LAMBORN v. COUNTY COMMISSIONERS.

97 U. S. 181.—1877.

MR. JUSTICE BRADLEY.—Lamborn, the plaintiff in error in this case, is the trustee and representative of the National Land Company. This company had contracted with the Kansas Pacific Railway Company for the purchase of a large quantity of the lands in

Kansas, to which the latter company was entitled under the congressional grant made to it, under the name of the Leavenworth, Pawnee and Western Railroad Company, and the Union Pacific Railroad Company, Eastern Division, by the acts of July 1, 1862, and July 2, 1864. The contract required the land company to pay all such taxes and assessments as might be lawfully imposed on the lands. And it provided that the railway company should, at the request of the land company, convey by deed of general warranty any of the lands purchased, whenever the purchase-money and interest and the necessary stamps should be furnished by the latter. The land company, after acquiring this contract, had contracted to sell large portions of the lands to third parties, taking from them agreements to pay all taxes and assessments that might be imposed upon the lands sold to them respectively. The lands in Dickinson county were assessed by the defendants for taxes for the years 1870, 1871 and 1872, successively, when, as yet, they were not taxable, no patent having been issued therefor, and the costs of surveying, selecting, and conveying the same not having been paid. These taxes, therefore, as decided by us in the case of Railway Company v. Prescott, 16 Wall. 603, were not legal. Nevertheless, the Supreme Court of Kansas, in that case, had held such taxes legal; and the taxes for the year 1870, now in question not having been paid, the treasurer of Dickinson county proceeded to advertise and sell the lands therefor in May, 1871, and, no person bidding the requisite amount, the lands were bid in for the county. The assessments for 1871 and 1872 were made against the lands whilst they were in this position.

By the laws of Kansas, if lands sold for taxes are bid in for the county, the county treasurer is authorized to issue a tax certificate to any person who shall pay into the county treasury an amount equal to the cost of redemption at the time of payment. Gen. Stats. of Kansas, c. 107, § 91. And if any lands sold for taxes are not redeemed within three years from the day of sale, the clerk of the county may execute a deed to the purchaser, his heirs or assigns, on the presentation to him of the certificate of sale. Sec. 112. It is further provided, that if the county treasurer shall discover, before the sale of any lands for taxes, that on account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer such lands for sale; and if, after any certificate shall have been granted upon such sale, the county clerk shall discover that, for any error or irregularity, such land ought not to be conveyed, he shall not convey the same; and the county treasurer shall, on the return of the tax certificate, refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of 10 per cent. per annum. Sec. 120.

In 1872 the plaintiff in error paid into the county treasury the sums due for taxes, interest, etc., on the said lands in Dickinson county, which had been sold for taxes as aforesaid, and received

tax certificates therefor, without making any protest, not being aware at that time, as he alleges, that the lands were exempt from taxation, but supposing that the taxes were legal and valid. On the second day of January, 1874, after the decision of this court in Railway Company v. Prescott, 16 Wall. 603, he offered to return the tax certificates to the county treasurer, and demanded a return of the money paid by him into the county treasury, with interest, which was refused by the treasurer; and thereupon this suit, against the board of county commissioners of that county, was brought to recover the same. * * * *

In the present case there is no dispute that all the facts and circumstances of the case bearing on the question of the legality of the tax were fully known to the plaintiff. He professedly relied on the law, as declared by the Supreme Court of Kansas, and supposed that the tax was legal and valid.

The only other ground left, therefore, on which a right to recover back the money paid can be at all based, is, that the payment was not voluntary, but by compulsion or duress. It is contended that the plaintiff was obliged to pay the taxes in order to remove the cloud from the title which had been raised by the tax sale, and to prevent a deed from being given to some third party after the expiration of the three years allowed for redemption.

It is settled by many authorities that money paid by a person to prevent an illegal seizure of his person or property by an officer claiming authority to seize the same, or to liberate his person or property from illegal detention by such officer, may be recovered back in an action for money had and received, on the ground that the payment was compulsory, or by duress or extortion. Under this rule, illegal taxes or other public exactions, paid to prevent such seizure or remove such detention, may be recovered back, unless prohibited by some statutory regulation to the contrary. Elliott v. Swartwout, 10 Pet. 137; Ripley v. Gelston, 9 Johns. 201; Clinton v. Strong, 9 Johns. 369; and cases cited in 2 Smith's Lead. Cas. (6th ed.) 468; Cooley Taxation, 568.

But it has been questioned whether a sale or threatened sale of land for an illegal tax is within this rule, there being no seizure of the property, and nothing supervening upon the sale except a cloud on the title. This view has been adopted in Kansas. In Phillips v. Jefferson County, 5 Kan. 412, certain Indian lands, not legally taxable, were, nevertheless, assessed and sold for taxes, and a certificate issued to the purchaser. Phillips, having acquired title to the land, paid the amount of said taxes, at the same time denying their legality, and saying that he paid the money to prevent tax deeds from issuing on the certificates. The court hold that the payment was purely voluntary, and add: "The money was not paid on compulsion or extorted as a condition. A tax deed had been due for nearly two years. Had the plaintiff desired to litigate the question, he could have done so without paying the money; even had a deed been made out on the tax certificate, it would have been set

aside by appropriate proceedings. There was no legal ground for apprehending any danger on the part of the plaintiff. He could have litigated the case as well before as after payment. Neither his person nor property was menaced by legal process. Regarding, then, the payment as purely voluntary, it is as certain as any principle of law can be that it could not be recovered back."

It seems to us that this case is precisely parallel with the one before us. We are unable to perceive any distinction between them. And as it is the law of Kansas which we are called upon to administer, the settled decisions of its supreme court, upon the very matter, are entitled to the highest respect. We are not aware of any decision which tends to shake the authority of Phillips v. Jefferson County. On the contrary, the same views have been subsequently reiterated. In Wabaunsee County v. Walker, 8 Kan. 431, a case precisely like it, with the exception that when the taxes were paid to the county collector to redeem the tax certificates, under a mistaken view of the law, he charged twice as much interest as he was entitled to, the party paid under protest. Yet it was held that he could not recover back even the illegal interest. The court relied on the previous decision in Phillips v. Jefferson County, and, after examining various other authorities, summed up the matter as follows: "A correct statement of the rule governing such cases as this would probably be as follows: Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest does not make the payment involuntary."

The question was again discussed in the recent case of the Kansas Pacific Railway Co. v. Commissioners of Wyandotte County, 16 Kan. 587; and although, in that case, a personal tax paid by the railroad company under protest was recovered back, such recovery was allowed on the ground that, if the tax was not paid, it would be the immediate duty of the county treasurer to issue a warrant to the sheriff to levy upon and sell the personal property of the company therefor. But the principles of the former cases were recognized and affirmed.

It has undoubtedly been held in other states (though perhaps not directly adjudged) that a payment of illegal taxes on lands, to avoid or remove a cloud upon the title arising from a tax sale, is a compulsory payment. The case of Stephan v. Daniels et al., 27 Ohio St. 527, is of this character; though in that case the plaintiff relied on the provisions of a local statute; and besides this, a legal tax was combined with an illegal assessment, and perhaps a sale would have conferred a valid title upon the purchaser. Where such would be the effect of a tax sale, we cannot doubt that a payment of the tax, made to prevent it, should be regarded as compulsory and not

voluntary. The threatened divestiture of a man's title to land is certainly as stringent a duress as the threatened seizure of his goods; and if imminent, and he has no other adequate remedy to prevent it, justice requires that he should be permitted to pay the tax, and test its legality by an action to recover back the money. But as, in general, an illegal tax cannot furnish the basis of a legal sale, the case supposed cannot often arise. If the legality of the tax is merely doubtful, and the validity of the sale would depend on its legality, according to the law of Kansas, the party, if he chooses to waive the other remedies given him by law to test the validity of the tax, must take his risk either voluntarily to pay the tax, and thus avoid the question, or to let his land be sold, at the hazard of losing it if the tax should be sustained. Having a knowledge of all the facts, it is held that he must be presumed to know the law; and, in the absence of any fraud or better knowledge on the part of the officer receiving payment, he cannot recover back money paid under such mistake. * * * * Judgment affirmed.

FIRST NATIONAL BANK OF AMERICUS v. MAYOR, ETC., OF AMERICUS.

68 Ga. 119.—1881.

Speer, Justice.—The First National Bank brought suit against the defendants, for the sum of $1,639, besides interest, alleging that petitioner was organized as a national bank association, and under the laws of the United States, was empowered to carry on a general banking business in the city of Americus; that, from the year 1872 to the present, by virtue of the authority aforesaid, petitioner has been engaged in the banking business in said city; that the petitioner is expressly exempted from the payment of any tax upon its business of banking, or upon its capital stock, except such tax as it is required to pay the government of the United States, as provided by section 5214 of the Revised Code of the United States. Further, petitioner alleges that, notwithstanding this exemption, the defendant wrongfully, and without any authority of law, has demanded of petitioner the sum of one hundred dollars per annum, as a license tax for carrying on the said business of banking in said city. Petitioner paid the tax under protest, and to avoid a seizure and sale of its property by said mayor and city council. Under this illegal assessment, it has paid the sums of one hundred dollars per annum from the year 1872 to 1877, inclusive, which was illegally extorted, as aforesaid, for carrying on said business, and which the congress of the United States had expressly licensed. Further, petitioner shows that, in the year 1874, while engaged in said business, under the authority aforesaid, defendant assessed a tax of one per cent. upon the capital stock of peti-

tioner, making the sum of six hundred and thirty-nine dollars, which was illegal and void, as the same was not subject to taxation by said city. Petitioner protested against the payment of said sum, but to avoid a sale and seizure of its property by said mayor and council did pay the said sum, in the year 1874, and the sum of three hundred dollars for the year 1875. Since the year 1875, it has urged upon said defendants the justice and equity of returning said sums, thus illegally assessed, but they now refuse to pay the same; wherefore, petitioner brings suit, etc.

To this declaration, defendants demurred, which demurrer was sustained by the court, and plaintiff's action dismissed; wherefore plaintiff excepted, and assigns the same as error.

The question in this record, submitted for our consideration is, whether the plaintiff has set forth a good and legal cause of action in his writ, and was there error in dismissing the same on demurrer? To determine this question properly, it will be necessary to inquire under what allegations and proofs can a complaining party recover of the authorities an illegal tax that has been levied, and collected of the party complaining—that is, what must be alleged in the writ and what must be proved on trial, for it is well established as a rule of pleading that everything must be alleged and proved that is essential to a recovery under the rules of law applicable to the cause on trial.

1. It is a well recognized rule, that a tax, voluntarily paid, even though illegally assessed by the taxing power, where there is no misplaced confidence, and no artifice, or deception, or fraudulent practice by the other party, cannot be recovered back. 50 Ga., 304.

2. So, where there is no ignorance, or mistake of facts, if money is paid to a corporation levying under a claim of right, under an ignorance or mistake of law, the same is not recoverable.

Under none of these grounds does the plaintiff here seek to recover. There is no charge of ignorance of fact, or of misplaced confidence, artifice, or deception, or fraudulent practice alleged against the defendants in levying and collecting this tax, and by reason of which it was paid by the plaintiff. There is only one ground alleged, or set forth, in plaintiff's writ, and this is made to apply to all of the taxes alleged to be illegally paid, and which are sought to be recovered. The petitioner alleges that "it protested against the payment of said sums, but, to *avoid the sale and seizure* of its property by said mayor and council, did pay the said sums," etc.

Duress or coercion is here *shadowed* forth as the impelling or moving power of this payment now sought to be recovered. But do the facts or causes alleged constitute either coercion or duress? It is well settled that money paid under protest merely does not make the payment a compulsory one. 13 Gray (Mass.), 476. Mr. Dillon, in his work on Corporations, lays down clearly and intelligently the rule. He says: "The coercion or duress which will

render a payment involuntary, must in general consist of some *actual* or *threatened* exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has *no other means of immediate relief* than by making the payment." 2 Dillon, sec. 943 (3d edition); Radick v. Hudson, 95 U. S. 210; 4 Gill 425; 18 Cal. 256; 1 Ohio St. 268. Tested by this rule, are there any allegations of facts in this writ that show "there was some *actual* or *threatened exercise* of *power*, by the party exacting or receiving the payment, over the *person or property of plaintiff*, from which he had no other immediate means of relief?" We see none. The writ must be construed most strongly against the pleader. The presumption is, he put his cause on record as favorably to himself as the truth of the case would warrant, and all he sets up by way of compulsion to justify or excuse the payment was, he did so, "under protest, and to avoid a sale and seizure of his property."

Three elements are essential, and must concur, to sustain an action to recover back money on the ground of the illegality of the tax.

First. The authority to levy the tax must be *wholly wanting*.

Second. The money sued for must have been *actually received* by the defendant corporation.

Third. The payment of the plaintiff must have been made upon *compulsion*, to prevent the *immediate seizure of his goods* or the *arrest of his person*, and not voluntarily made.

Unless these conditions concur, paying under protest will not give a right to recovery. Dillon on Mun. Corporations, sec. 940.

There being no statutory right regulating this action in our state, we are remitted to the common-law rule of force, and this is well and succinctly stated by the supreme court of the United States in two recent cases where actions were brought to recover back illegal taxes. Lamborn v. Dickinson & Co., 97 U. S. 181 (1877); Union Pacific R. R. v. Dodge County, 98 U. S. 541 (1878). In these recent cases the court lays down the following rule: "Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an *immediate and urgent necessity therefor*, or unless to *release* (not to avoid) his person or property from detention, *or to prevent an immediate seizure* of his person or property, such payment *must be deemed voluntary*, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary." 2 Dillon 947. This rule was also fully recognized in a decision of this court in a recent case, at Sept. Term, 1880, not yet published,[1] of the Mayor of Savannah v. Feeley, which was a much stronger case than the one at bar. Tested by this rule of liability, and we think it the correct one, the case, as set forth in the plaintiff's declaration, falls far short of its requirements. But it is insisted that a more liberal ruling by this court, in favor of a

[1] 66 Ga. 31.

recovery in such a case, was made in 48 Ga. 309. In that case the court laid down the rule, generally, that a tax levied without authority of law may be recovered, but the case did not decide that a *voluntary* payment could be recovered under such circumstances, nor that a recovery could be had unless the payment was compulsory.

Public policy does not favor the institution of such suits. The complainant had his legal right to resist illegal taxes when levied, and when he acquiesces and knowingly pays an illegal assessment, and the sums raised are disbursed for the public good, of which he is one of the recipients, courts will not regard with favor a complaint that might have been prevented by the exercise of that diligence that the law favors. He must bring himself within the *strict rule* the law has fixed, that entitles him to recover; otherwise he must abide the consequences of his own default and negligence.

Let the judgment of the court below be affirmed.

BOROUGH OF ALLENTOWN v. SAEGER.

20 PA. ST. 421.—1853.

THIS suit was brought before a justice of the peace by Jacob Saeger v. The Burgess and Town Council of the Borough of Allentown, to recover back the amount of taxes illegally assessed, which had been paid by Saeger, the plaintiff, to the tax collector. The illegal tax was one laid for borough purposes upon moneys at interest. In the case of Bridges v. The Borough of Allentown, it had been decided that under the charter of the borough, moneys at interest were not taxable for borough purposes.

LOWRIE, J.—Part of the taxes charged against Saeger was legal and part illegal, and he paid the whole on demand, and now seeks to recover back the part that was illegally assessed. It cannot be allowed. The case is very different from that of payment to an individual by mistake. It was submission to legitimate authority which was *prima facie* right in its exercise. The taxing officers performed their duty as well as they knew how, and the tax was submitted to by one who was interested in the purposes for which it was raised, though it might have been resisted in legal form. This was an assent to pay more in support of the government of the town than the town had a right to demand, and the law does not imply the duty of refunding. If it had been paid under protest, that is, with notice that he would claim it back, this would repel the implication of an assent, and give rise to the right of reclamation.

In another aspect it is unlike a payment to an individual. It is a contribution to a common fund, in the benefits of which he, as a citizen or property holder, participates. It is intended for imme-

diate expenditure for the common good, and it would be unjust to require its repayment, after it had been thus, in whole or in part, properly expended, which would often be the case if suit could be brought for its recovery without notice having been given at the time of payment; and there would be no bar against its insidious spring but the statute of limitations. On these principles the defendant below is entitled to the judgment.

Judgment reversed and judgment for the defendant below.

GOULD v. BOARD OF COMMISSIONERS OF HENNEPIN COUNTY.

76 Minn. 379.—1899.

Upon the application for re-argument, p. 381.

Per Curiam.—* * * The chief ground upon which a re-argument is asked is that the court did not give due weight to the fact that, according to the complaint, the plaintiff paid the tax in ignorance of the fact that any part of it was illegal. It should be kept in mind that the rules which apply to actions to recover back money paid by one person to another do not apply, to their full extent, to actions to recover back from a county, town, or other municipality money in payment of taxes illegally or irregularly assessed or levied. There are certain considerations of public policy which must necessarily be taken into consideration. If a party could recover back from the public whenever there was some illegal or irregular action on the part of public officers in the assessment or levy of the tax, merely because he was ignorant of such illegality or irregularity at the time he paid the tax, the public finances would be thrown into chaos, and frequently municipalities would be reduced to utter bankruptcy. Municipalities do not guaranty the taxpayers correct action on part of their officers. Irregular action does not necessarily injure the parties concerned, and, when it does, the remedies given by review, appeal, or by way of defense to proceedings to enforce the tax are supposed to afford full redress. Cooley, Tax'n, 566. In this case the property was subject to taxation. The illegality or irregularity complained of consisted exclusively of the action of the state board of equalization in raising the assessed value of one class of real estate in the town without making the same increase on another class. This illegality or irregularity appeared from the public records. Plaintiff had the means of discover-

ing this, and he was just as much bound to inform himself of the fact as were the public authorities. Every man is supposed to know the law. If plaintiff was ignorant of the facts of which he now complains when he paid the tax, it was because he failed to avail himself of the means of information which were open to him. His tax having been paid without investigation, and without duress of either person or property, the payment must be deemed voluntary. We have not the time now to go extensively into the subject when taxes paid may be recovered back from a public municipality, but it may be suggested that in many states there are statutes which extend the right much beyond what it would otherwise be. Many of their statutes, and the decisions under them, are to be found in 25 Am. & Eng. Enc. Law, 465 et seq. And, even where there are no statutes governing the subject, the decisions of the courts are not always in harmony. But, upon the particular facts of this case, we think that a recovery could not be had, under the rulings of any well-considered case in any court. Application denied.

SHELDON, J., IN FALLS v. CITY OF CAIRO.

58 ILL. 403.—1871.

ADMITTING these assessments to have been illegal, unconstitutional and void, because the making of the assessments was confined to the particular property fronting upon the street, which might be specially benefited, and was not extended to all property which might be so benefited, after having paid them, under the circumstances of this case, is the appellant entitled to recover the money back, on the ground of the payment having been a compulsory, and not a voluntary one?

The precept which was in the hands of the officer at the time these assessments were paid, did not authorize him to levy upon the goods and chattels of the appellant, but directed him merely to make sale of the lots to satisfy the assessments.

In Bradford v. The City of Chicago, 25 Ill. 411, it was held that the payment of an assessment made to a collector of taxes, while having in his hands a warrant to levy and collect the amount of the assessment of the goods and chattels of the owner, might be considered compulsory, and made under such circumstances as would authorize the party paying the money to recover back the same if the assessment was illegally made. But it was decided in Stover v. Mitchell, 45 Ill. 213,[1] that a levy of an execution upon

[1] The court in this case says (p. 217): "We can discover no duress or compulsion where an execution against A is levied on the land of B. The latter is not disturbed in his person, or the possession or enjoyment of his property. If confident of his title he need give himself no trouble. If the superiority of his title to the lien of the judgment is questionable, or depends on matters

one's land, did not make a case of such duress or compulsion, that a payment made to prevent the sale of the land under the execution could be recovered back as a compulsory payment. It was held to be a voluntary payment, and not one made under duress; and it is there said: "It is insisted, that the levy of the execution on Stover's land was the exercise of such compulsion as to interfere with Stover's freedom of action. No case is cited going to this extent, and we venture to say none can be found. In order to render such a payment compulsory, such a pressure must be brought to bear upon the person paying, as to interfere in some way with the free enjoyment of his rights of person or property," citing Bradford v. The City of Chicago, *supra,* and Elston v. The City of Chicago, 40 Ill. 514.

There was here no interference with the plaintiff's free enjoyment of his property, and there would not have been, by making sale of it under the precept. Such sale would not have disturbed his possession of the property; he would then have had two years to redeem from the sale, and if, at the end of that time, the purchaser had obtained his tax deed, and brought his action of ejectment for the recovery of the possession, the illegality of the assessments could have been shown in defense, and the recovery of possession defeated. Or, had the plaintiff desired to remove any cloud which might be brought upon his title by such a sale, he could have had his remedy for that purpose. It is very unlike the case of the payment of money made to avoid the seizure of goods, or to gain possession of them, where there may be a pressing necessity for their immediate use, and being of a movable and perishable character, any legal remedy might be inadequate for full protection. The reasons upon which it is held, that when a party is compelled, by duress of his person or goods, to pay money for which he is not liable, the payment is not voluntary, but compulsory, and that he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back, do not apply in the case of real estate threatened with such action, as in the present case. And we think the payment of these assessments was not made under such circumstances of constraint and compulsion as to except it from the operation of the legal principle, that if a party, with full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards recover back the money.

in pais, resting in parol proof, and he fears a sale may create a cloud upon his title, he can stay the sale by injunction. If, instead of this, he prefers to buy his peace, he cannot subsequently say he acted under compulsion, and call on the courts to give him back his money."

FLEETWOOD v. CITY OF NEW YORK.

2 SANDF. 475 (SUPERIOR CT. OF NEW YORK CITY).—1849.

ASSUMPSIT, brought to recover the sum of $2,527.22, paid by Fleetwood, the plaintiff, to the defendants, February 27, 1845, to redeem several lots of ground belonging to him, from a sale thereof, made by the defendants on the 13th of June, 1843, under an alleged assessment for *filling the lots.*

SANDFORD, J.—* * * * The important question remains, can the plaintiffs recover back the money paid? The payments were not made under any mistake of fact. The plaintiffs declared and insisted that the assessments and the sales were void; and the referee has adjudged that they were void. There was no mistake of law even; for the plaintiffs knew perfectly well that a sale under a void assessment conferred no title upon the purchaser.

It is contended, however, that the payments were involuntary, and were made by compulsion. That the sales constituted a cloud upon the title, which cloud circumstances compelled the plaintiffs to remove; and it is intimated by the points made in Mr. Post's case,[1] that his payment was made through coercion, oppression, imposition, fraud, or by taking undue advantage of his situation, or by wrongfully exacting it, *colore officii.*

1. In regard to the cloud upon the title. The muniments of title, upon an assessment sale, consist of several proceedings, all of which are indispensable to its validity, and if one be wanting, no title is shown. Of these links in the chain, the plaintiff insists that three at least never existed, viz.: the original ordinance directing the filling, the assessment of the expense, and the advertisement for redemption. Each of these proceedings forms an essential part of the record of the assessment title, and in their absence, such title is void upon its face. See the observations of the Chancellor, in Wiggin v. The Mayor, etc., of New York (9 Paige 16), and Van Doren v. The Same Defendants (Id. 388). A conveyance or judgment, void upon its face, does not constitute a cloud upon the title; and the assertion of a title under such a conveyance, or of a lien by virtue of such a judgment, does not afford a ground for equitable interference; much less does it constitute legal compulsion. There are cases of duress of personal property in which payments for its relief are deemed involuntary, and the money may be recovered back. Most of these have arisen upon seizures of goods under revenue or excise laws, and by public officers acting under process or warrant of law. The principle has been extended, occasionally, to cases where bailees, or others, who came into the possession of goods lawfully, have exacted more than was due, before they would relinquish such possession. It is founded upon the movable and

[1] Argued and decided with this case.—ED.

perishable character of the property, and the uncertainty of a personal remedy against the wrongdoer. The reasons for the rule are wholly inapplicable to real estate, and we are not aware of any instance in which it has been applied to that species of property. On this subject of payments compelled by duress of property, we refer to Chase v. Dwinall (7 Greenl. 134); Ellicott v. Swartwout (10 Peters 137); and Clinton v. Strong (9 John. 370).

It cannot be said, therefore, that the payments in question were made through compulsion, coercion or oppression. There is no pretense that there was any imposition or fraud in the case. There was no advantage taken of the situation of the parties, nor was the money in any sense exacted from them. The corporation, whose agent, the street commissioner, received the money, was not only passive in respect to the payment, but so far as the case discloses, had no interest in the matter. The money, if the lots were redeemed, belonged to the purchasers; and no part of it was to be retained by the corporation, and it was to the latter totally indifferent whether the redemption should be made or omitted.

The simple truth of the affair is this. The corporate authorities had sold these lots for assessments which they and the purchasers alleged to be valid in fact and in law. The original owners were entitled to redeem, on paying the bids with interest to the purchasers, through the street commissioner. Those owners averred and insisted that the assessments were absolutely void, both in fact and in law, and that the sales and conveyances were equally void. Thus the parties were at issue, each claiming a right, and the plaintiffs fully apprised of the grounds of the opposing claim. It became desirable for the one plaintiff to sell his lots, and for the other to mortgage his, and the assessment claims presented an obstacle to the accomplishment of their wishes. The plaintiffs, rather than forego the opportunity of mortgaging and selling, chose to pay the assessments claimed; instead of abiding the result of a litigation testing their validity.

In our view, this clearly constituted a voluntary payment, which according to a well settled and valuable principle of law, cannot be recalled. Silliman v. Wing, 7 Hill 159; Supervisors of Onondaga v. Briggs, 2 Denio 26, 39; Brisbane v. Dacres, 5 Taunt. 143; Robinson v. City of Charleston, 2 Richardson 317. And see Ege v. Koontz, 3 Barr's Penn. R. 109. * * * *

WHITNEY v. CITY OF PORT HURON.

88 Mich. 268.—1891.

Morse, J.—The plaintiff sues to recover taxes paid by her under protest on a special assessment levied for the paving of Pine Grove Avenue, in the city of Port Huron. She had judgment in the court

below, the verdict of the jury being directed by the circuit judge in her favor. * * * *

It is also claimed that her payment of the tax was voluntary. The tax was paid April 2, 1886, and across the face of the receipt was written as follows: "Paid under protest, to protect property from being sold, and on account of taxes being illegal." The city treasurer had advertised the plaintiff's property for sale, and she had the right to presume that he would proceed with the sale. The fact that the sale would have conveyed no title to the puchaser on account of the illegality of the tax, or that she could have removed the cloud upon her title caused by such sale by legal proceedings had no bearing upon her right to pay the tax under protest, and thereby stop the sale. Nor was it any the less an involuntary payment under the law. If, because a tax is illegal, and a sale of property under it would be void, a payment to prevent the seizure or sale of one's property cannot be considered an involuntary payment, then our statute providing for the payment of taxes under protest would be of no force or use. If the citizen's property is threatened with seizure under a tax warrant, or his real estate is advertised for sale to collect delinquent taxes, he is, equally in both cases entitled to free his property by a payment of the tax under protest, and such payment will not be considered voluntary. It was held in Detroit v. Martin, 34 Mich. 170, that one who has full knowledge of all facts, being conclusively presumed to know the law, is presumed to know that an assessment, laid under a statute which is *unconstitutional and void,* cannot be made the basis of a sale that could constitute any cloud upon his title, and therefore to know that he could not be injured by it; and that a payment of a tax under protest, in such a case, where no seizure of goods or of the person had been made or threatened, and where the officer had no authority to compel payment otherwise than by a sale of land, which could injure no one, would not be other than a voluntary payment, as a protest would not change the character of the payment. It was held also that a sale of the land under such circumstances would not create a cloud upon the owner's title. This may be good law when applied to proceedings under an unconstitutional enactment, which is no law, and is held to confer no rights upon any one, as all must be presumed to know that it is unconstitutional and void; but it cannot be applied to cases where the statute under which the proceedings to levy the tax are taken, is constitutional, and where the illegality of the tax is claimed from irregularities or defects in the statutory proceedings. If it were so, it would require of the landowner a greater knowledge of the law than attorneys, or even courts, possess. For instance, in the present case, able attorneys for the defendant are claiming that the tax paid by the plaintiff was a legal one, and that all the proceedings in assessing it were lawful; yet at the same time they argue that, if it should be determined by this court to be illegal for any reason, then the plaintiff's payment must be con-

sidered a voluntary one, and she cannot recover what she has paid, because she and every one else are presumed to know that the tax is void, and that a sale under it could convey no title, and therefore cast no cloud over her title. But the fact remains, as every one knows, that a tax-deed or any other purported conveyance of land does cloud the title, and that it can never be sold or exchanged as readily, and seldom for as great a price, as when unincumbered, although it may be patent to the courts that such deed or conveyance is void and of no consequence, as far as the holding of the title is concerned; and, in my opinion, the owner of the land has the right, in law and equity, to treat every such tax-deed or other conveyance as a cloud upon his title, and to take such steps to get rid of it, or to prevent its issue or record, as the law authorizes, when the title is actually clouded, as defined by some of the authorities. A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title which the law should recognize and remove.

The third objection is that the protest of plaintiff was not sufficiently specific. Across the face of the receipt for the taxes paid by the plaintiff was the following: "Paid under protest, to protect property from being sold, and on account of taxes being illegal." In support of this objection we are cited to Louden v. East Saginaw, 41 Mich. 26, 2 N. W. Rep. 182; Lumber Co. v. Crystal Falls Tp., 60 Mich. 514, 27 N. W. Rep. 666; Iron Co. v. Crystal Falls Tp., 60 Mich. 79, 26 N. W. Rep. 840. The two last cases do not apply, as the protest was made under a special statute. In Louden v. East Saginaw the objection to the tax did not go to the jurisdiction of the city to enter upon the work, but to irregularities in the assessment of the tax, and it was held that the plaintiff should have pointed out more specifically his reason for his objections to the tax, and why he asked that the assessment against him should be refunded. It was said: "The case stands on a very different footing from one relating to an entirely illegal assessment. The only illegality here was in a notice which may or may not have been seen by the parties." Louden v. East Saginaw, 41 Mich. at page 22, 2 N. W. Rep. 182. In the present case the claim is that the whole proceedings were void, and without jurisdiction. A case involving the legality of the proceedings to pave Pine Grove Avenue had been decided in this court before the council were asked to refund this money, and that body then well knew that the whole proceeding had been declared void for want of jurisdiction, for the reason that the resolution providing for the grading and paving of the street had not been approved by the mayor as provided by the charter of Port Huron.

Twiss v. City of Port Huron, 63 Mich. 528-532 30 N. W. Rep. 177. * * * *

The judgment is affirmed with costs. The other justices concurred.

GORDON, J., IN MONTGOMERY v. COWLITZ COUNTY.

14 WASH. ST. 230.—1896.

THERE is much conflict in the authorities as to whether, under the circumstances of a given case, a payment is to be regarded as voluntary or compulsory, especially where the payment is made to prevent a threatened sale or interference with real estate. Without attempting any analysis of the many cases bearing upon that question, we are satisfied to adopt the rule announced in Detroit v. Martin, 34 Mich. 170: "How would such sale have affected plaintiff's right or title thereto? Would such sale have constituted a cloud upon his title? Assuming that it would, in order to prevent this, he could have paid the amount under protest, and afterwards have maintained an action to recover it back. If a sale, under the facts stated, would not have constituted a cloud upon his title, then it may be at least doubtful whether the plaintiff has any remedy." And we may add that there is much authority to be found in support of this view. Bruecher v. Village of Port Chester, 31 Hun 551 (affirmed in 101 N. Y. 240, 4 N. E. 272); Mills' Guardian v. City of Hopkinsville, (Ky.) 11 S. W. 776; Whitney v. City of Port Huron, 88 Mich. 268, 50 N. W. 316; Bucknall v. Story, 46 Cal. 589; State v. Nelson, 41 Minn. 25, 42 N. W. 548; Seeley v. Town of Westport, 47 Conn. 294; Guy v. Washburn, 23 Cal. 111; Stephan v. Daniels, 27 Ohio St. 527; Valentine v. City of St. Paul, 34 Minn. 446, 26 N. W. 457.

This brings us to the question of whether the sale which was here threatened would, if consummated, have created any cloud upon appellant's title. Upon the part of the respondent it is contended that the lands were not subject to taxation, and that the assessment and all subsequent proceedings were absolutely void, and that by a sale, as was contemplated, no cloud would have been created upon appellant's title. "A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole, or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality; if, upon the face of the proceedings, it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record, and comparing it with the law, is at once apprised of the illegality,—the tax it would then seem, could neither constitute an incumbrance nor an apparent defect of title, and there-

fore, in law, could constitute no cloud. * * * When, however, the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence *aliunde,* so that the record would make out a *prima facie* right in one who should become purchaser, and the evidence to rebut this case may possibly be lost, or be unavailable, from death of witnesses or other cause, or when the deed given on a sale of the lands for the tax would, by statute, be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon that for a recovery of the lands until the illegalities were shown, the courts of equity regard the case as coming within their ordinary jurisdiction, and have extended relief on the ground that a cloud on the title existed, or was imminent." Cooley, Tax'n (1st ed.), pp. 542, 543. Section 2937 of the Code of 1881, in force at the time of the payment in question, in reference to tax deeds provided, "Such tax deed, duly acknowledged or proven, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." In this case, the taxes paid to the sheriff were not invalid because of any illegality apparent upon the tax or assessment rolls, but because of the fact that technically the legal title was still in the United States,—withheld solely because of the failure to deposit the cost of making the survey. Hence, as a matter of law, it could not have been ascertained from an examination of the record whether the taxes were valid or otherwise. Their validity depended upon whether a deposit of the cost of survey had in fact been made. Had the sale which was threatened actually occurred, and a tax deed issued, that instrument, upon its face, and so far as the public records disclosed, would have been valid, and appellant would have been obliged to resort to an action to remove the cloud caused by an instrument apparently valid, in order to show the facts which rendered it invalid. Under such circumstances, and to prevent the cloud upon his title which the threatened sale would have created, we think it was competent for him to pay the taxes to the sheriff under protest, as was done, and that payment under such circumstances does not constitute a voluntary payment.

LINDSEY v. ALLEN, Town Treasurer, et al.

19 R. I. 721.—1897.

Per Curiam.—This is an action to recover money paid for a tax, under a void levy on the plaintiff's estate. The agreed statement of facts shows that the tax was assessed against Robert E. Wilcox, who was, at the time of the assessment, the owner of the real estate on which it was assessed. Subsequently the plaintiff became the purchaser of the real estate. After the expiration of more than two

years from the assessment, when, under the provisions of the statute, the tax had ceased to be a lien on the real estate, the collector levied his warrant upon it for the collection of the tax. Thereupon the plaintiff paid the tax, and now sues to recover the amount paid.

It is well settled that a payment under stress of legal process is compulsory, and if unlawfully exacted may be recovered. 2 Desty on Taxation, 795, and cases cited. In Dunnell v. Newell, 15 R. I. 233, this court held that the mere holding by a collector of a warrant to collect a tax by levy or distress was not of itself, and before any step was taken or threat of enforcement by levy or distress, sufficient to make a payment compulsory. The present case differs from that in this—that a step had been taken against the plaintiff's property by a levy thereon. The only remedy which the plaintiff had, therefore, was either to pay the tax or take the chance of defeating the sale of his property upon the ground that the levy was void. In our opinion, therefore, the payment amounted to a compulsory payment, and hence the plaintiff on this ground is entitled to recover from the collector, in whose hands the money still remains. * * * *

SHAW, C. J., IN PRESTON v. CITY OF BOSTON.

12 PICK. (MASS.) 7.—1831.

THE only remaining question is, whether this money was paid voluntarily or under duress. A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he protested at the time against his liability. The reason of this is obvious. The party making the demand may know the means of proving it, which he may afterwards lose; and because another course would put it in the power of the other party to choose his own time and opportunity for commencing a suit. Brisbane v. Dacres, 5 Taunt. 143. But it is otherwise when a party is compelled by duress of his person or goods to pay money for which he is not liable; it is not voluntary but compulsory, and he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back. Astley v. Reynolds, 2 Str. 916.

What shall constitute such duress is often made a question. Threat of a distress for rent is not such duress, because the party may replevy the goods distrained and try the question of liability at law. Knibbs v. Hall, 1 Esp. 84. Threat of legal process is not such duress, for the party may plead, and make proof, and show that he is not liable. Brown v. M'Kinally, 1 Esp. 279. But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party, upon which he has no day in court, no

opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable recover it back as money had and received. Amesbury W. & C. Manuf. Co. v. Amesbury, 17 Mass. 461.

It appears by the facts agreed that upon the first notice of the tax, the plaintiff applied to the treasurer and collector, setting forth his specific ground of objection, namely, that he was not an inhabitant and not liable to the tax on personal property. The plaintiff was informed by the collector that he had no discretion on the subject, and unless he obtained an abatement a warrant of distress would issue against him. He then applied to the city government, stated the grounds of his objection, and remonstrated against the tax; but they decided that the tax must be paid, of which the collector was duly informed. The law under which the treasurer and collector acted obliged him to issue a warrant, under which the person and property of the plaintiff would have been liable to be taken, and that officer had notified him that such warrant would be issued. Under these circumstances the money was paid, and we think it cannot be considered as a voluntary payment, but a payment made under such circumstances of constraint and compulsion, and with such notice on his part that it was so paid, that on showing he was not liable he may recover it back in this action from the defendants into whose treasury it has gone.

Defendants defaulted.

ATWELL v. ZELUFF.

26 Mich. 118.—1872.

Campbell, J.—Atwell sued Zeluff, who was supervisor of the town of Ridgway, Lenawee county, in an action of trespass, the cause of action being the issue by Zeluff of tax rolls for the collection of ditch taxes against Atwell, one of which he paid on demand of the collector, and the other was enforced by selling his personal property. The warrant issued to the collector was the one required by law for the regular annual taxes, to be enforced, in case of nonpayment, by sale of chattels. The ditch tax was extended on the general tax roll.

In regard to the payment made without levy on his goods, it was objected that the payment being without protest, was voluntary. This question was somewhat discussed, but not actually decided, in the case of First National Bank of Sturgis v. Watkins, 21 Mich. R. 483. Where an officer demands a sum of money under a

warrant directing him to enforce it, the party of whom he demands it may fairly assume that if he seeks to act under the process at all, he will make it effectual. The demand itself is equivalent to a service of the writ on the person. Any payment is to be regarded as involuntary which is made under a claim involving the use of force as an alternative, as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that an officer will desist after once making demand. The exhibition of a warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent to actual compulsion.

There has been some confusion among the authorities as to the necessity or effect of a protest in such cases, but the question has not often arisen upon the service of legal process. In some cases it has been intimated that it might be necessary, in order to recover back a payment from the person to whom it was actually paid, after he had paid over the money under his agency. But where the person demanding and receiving the money, does so under color of process, as a legal officer, we think the payment must be deemed involuntary, because the party paying has no legal means, by appeal or otherwise, of preventing the seizure of his property. If he has such means of redress, which would be effectual to stay the process, there is reason for making the distinction which may, perhaps, be sustained. The supreme court of Massachusetts, in Boston & Sandwich Glass Co. v. City of Boston, 4 Met. 181, citing a former case in 17 Mass. 461, refer to the absolute character of the warrant as excusing the necessity of a protest. But we think the rule of damages there adopted as to the difference of liability where there is and where there is not a protest, is also based on good sense. Where the money is not paid under protest, it is there held that no interest should be allowed until demand or action brought, so as to put the party sued in actual fault for not making satisfaction as soon as the wrong is pressed upon his notice. A payment without protest may prevent him from making inquiry and examining into the law, and while legal ignorance will not excuse an illegal demand, it may very properly qualify the extent of damages for a merely technical wrong. * * * *

Judgment must be reversed, and a new judgment must be entered for plaintiff, on the finding, for the amount of the illegal exactions, with interest from suit brought, and with costs of all the courts.

There are such practical hardships in permitting persons to be held liable to action, where no distinct protest is made, pointing out reasons why a collector should withhold action under his warrant, that it is a proper subject for legislative consideration, whether some provision should not be made to regulate the matter. The officers can seldom be expected to understand the niceties of the law, and it is not desirable that persons should be deterred from holding the necessary local offices by fear of consequences for which they are not morally responsible.

The other Justices concurred.

Lyon, J., in PARCHER v. MARATHON COUNTY.

52 Wis. 388.—1881.

We think it must be held, on principle and authority, that the payment of a demand under compulsion of legal process, such payment being accompanied by a protest that the demand is illegal and that the payer intends to take measures to recover back the money paid, is not a voluntary payment. And further, to constitute compulsion of legal process it is not essential that the officer has seized, or is *immediately* about to seize, the property of the payer by virtue of his process. It is sufficient if the officer demands payment by virtue thereof, and manifests an intention to enforce collection by seizure and sale of the payer's property at any time. On the general question we are considering, numerous authorities are cited in Cooley on Taxation, in the notes on pages 568-571. The case of Powell v. Sup'rs of St. Croix Co., 46 Wis. 210, is an illustration of what constitutes a voluntary payment. It follows, from the views above expressed, that when the learned circuit judge instructed the jury that unless, when the tax was paid, the sheriff had the present intention and purpose to seize the plaintiff's goods *then and there,* the plaintiffs could not recover, and that an intention to seize at a future day was not sufficient, he laid down a limitation of the liability of the defendant which the law does not sanction.

For this error the judgment must be reversed, and the cause remanded for a new trial.

RUMFORD CHEMICAL WORKS v. RAY, Town Treasurer.

19 R. I. 456.—1896.

Matteson, C. J.—* * * * The facts appear as follows: On October 19, 1894, the assessors, having completed the assessment, dated, signed, and deposited it in the town clerk's office. The town clerk thereupon made a copy of it, and delivered the copy to the town treasurer. The town treasurer on October 27, 1894, issued and affixed to the copy a warrant, under his hand, directed to George F. Hunter, the collector of taxes of the town, commanding him to proceed to collect the several sums of money expressed in the copy, of the persons and estates liable therefor, on or before the 1st day of June, 1895, with interest at the rate of 6 per cent. per annum from and after November 30, 1894, in case the same were not paid on or before November 30, 1894. Among the sums expressed in the copy of the assessment was the tax illegally assessed against the plaintiff. The collector, on the same day that the warrant was issued to him, to-wit, October 27, 1894, gave notice to the taxpayers

of the levy and assessment of the tax, and requested them to pay the sums assessed on or before November 30, 1894; that interest at the rate specified would be charged on all taxes not paid within the time limited in the warrant; and that, in compliance with the vote of the town, all taxes not paid on or before June 1, 1895, would be collected according to law. On November 28, 1894, the plaintiff paid the tax assessed against it, accompanying the payment by a written protest in the following form: "To the Town Treasurer and Collector of Taxes of the Town of East Providence: The undersigned, the Rumford Chemical Works, herewith pays the tax assessed on its personal property, amounting to the sum of eight thousand four hundred dollars ($8,400), under protest; claiming that the same was improperly, wrongfully, and illegally assessed against it, and reserving the right to bring suit against the town of East Providence to recover the same, with interest thereon. Rumford Chemical Works, by N. D. Arnold, Treas. East Providence, November 28, 1894."

The defendant contends that the plaintiff is not entitled to recover, because the payment is to be deemed a voluntary payment, since it was made with a full knowledge of the facts which render it illegal, and without any immediate or urgent necessity,—no proceeding having been taken by the collector for the collection of the tax, and notice having been given by him that he would take no such proceedings until after June 1, 1895; that the fact that the payment was accompanied by a protest did not render it any the less a voluntary payment.

There is considerable diversity of opinion on the subject of the recovery of moneys paid for taxes illegally assessed. The cases turn on the question whether, in the particular circumstances of the case, the payment was to be regarded as voluntary or involuntary; some courts holding that unless a payment be made under an immediate or urgent necessity, i. e., to avoid an actual or threatened seizure or sale of one's goods, the payment is voluntary, and cannot be recovered, even if made under protest. Others hold that when a warrant is in the hands of a collector, which authorizes him to levy upon and sell the property of the delinquent taxpayer,—such warrant being in the nature of an execution, and there being no means for testing the validity of the tax,—a person illegally taxed may pay the tax under protest, and that the payment so made is not a voluntary payment, in such sense as to prevent its recovery. This was the view adopted by us after due consideration, in Manufacturing Co. v. Newell, 15 R. I. 233, 238, 2 Atl. 766. In addition to cases cited in that opinion on this point, reference may also be had to Allen v. Burlington, 45 Vt. 202, 213, 214; Atwell v. Zeluff, 26 Mich. 118; North Carolina R. Co. v. Commissioners of Alamance, 77 N. C. 4; Galveston Gaslight Co. v. Galveston Co., 54 Tex. 287, 292, 293; Bright v. Halloman, 7 Lea 309, 312. The origin of the doc-

trine of "immediate and urgent" necessity seems to have been the dictum of Lord Kenyon in Fulham v. Down, 6 Esp. 26, "that where a voluntary payment was made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (or, as expressed by Mr. Bearcroft, unless to redeem or preserve your person or goods), it is not the subject of an action for money had and received." The phrase "immediate and urgent necessity," as stated in Baker v. City of Cincinnati, 11 Ohio St. 534, 538, is certainly indefinite. It seems to us to have been pressed to an unwarrantable length by the cases which hold that nothing less than an actual or threatened seizure of goods will render a payment involuntary, and that a payment under protest, unless made in case of an actual or threatened seizure, is to be treated as a voluntary payment. The parenthetical illustration thrown in by Lord Kenyon, in explanation of the phrase, as its equivalent, is, "unless to redeem or *preserve* your person or goods." Payment to avoid the levy of a warrant already issued and in the hands of the collector, and just as sure to be levied, if the money is not paid, as night to follow day, is just as much a payment to preserve one's goods as though the levy had actually been threatened or made. A voluntary payment implies that the man who makes it intends to waive any right which he may have to resist it. When he gives notice by his protest that he does not waive his right, but intends to insist upon it, such implication is negatived. Chief Justice Tindal, in Valpey v. Manning, 1 Man. G. & S. 594, 603, after quoting the dictum of Lord Kenyon, adds: "I am not aware that there is any difficulty or impropriety in laying it down that where money is voluntarily paid, with full knowledge of all the circumstances, *the party intending to give up his right,* he cannot afterwards bring an action for money had and received; but that it is otherwise where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold." We see no reason to depart from the decision in Manufacturing Co. v. Newell. The rule there adopted seems to us sensible and just. It is easy of application, and productive of as little inconvenience and hardship to the parties as is practicable. By the protest, the collector, and through him the town authorities, are notified that the tax is not paid in the ordinary course of business, that its legality is disputed, and that suit is to be instituted to test its validity. The town receives the money, which may be needed for its immediate necessities. Both the town and the taxpayer are saved the expense of unnecessary proceedings. The controversy is determined by the court, and the money retained or refunded according to the decision of the court.

The defendant also makes the point that the protest is not sufficient because it does not specify the alleged illegality, and supports it by reference to a criticism in passing by the court upon a similar protest in Railroad Co. v. Commissioners, 98 U. S. 541. We see no reason for requiring a specification in the protest of the alleged

illegality. All the facts connected with the assessment are certainly as fully known to the assessors as to the taxpayer, and they are in as good a position as he is to know whether the tax is legal or illegal. Mason v. Johnson, 51 Cal. 612. Judgment for the plaintiff for its claim and costs.

Note in 7 Columbia Law Review, 601: Rocovery for Taxes Under General Principles of Quasi-Contracts.—The law is well settled that taxes may be recovered if involuntarily paid under an illegal, Preston v. Boston (Mass. 1831), 12 Pick. 7; Atwell v. Zeluff (1872), 26 Mich. 118, and not merely irregular, Wiesmann v. Brighton (1892), 83 Wis. 550; Carton v. Commissioners (1902), 10 Wyo. 416, assessment, but not if paid voluntarily even though the tax act be unconstitutional. Otis v. The People (1902), 196 Ill. 542; Milwaukee v. Whitefish Bay (1900), 106 Wis. 25. Great confusion exists, however, as to what constitutes an involuntary payment. A payment may be clearly involuntary in fact and yet be "deemed voluntary" by the courts. It is usually held that a sufficient legal duress is shown if the payment is made to prevent arrest of person, Briggs v. Lewiston (1849), 29 Maine 472, or seizure and immediate sale of property. Babcock v. Beaver Creek (1887), 65 Mich. 479; Lindsey v. Allen (1897), 19 R. I. 721. Some jurisdictions, however, make the question coextensive with the creation of a cloud upon title, and hence deny recovery if the sale was threatened under a tax invalid on its face. Montgomery v. Cowlitz Co. (1896), 14 Wash. 230; Bucknall v. Story (1873), 46 Cal. 589; see Sowles v. Soule (1886), 59 Vt. 131. In other jurisdictions the better view is taken that a warrant in the hands of an officer who has power to levy on execution, constitutes sufficient duress since it is reasonably to be presumed that he will do his duty. Glass Co. v. Boston (Mass. 1842), 4 Metc. 181; Turnbull v. Township (1889), 74 Mich. 621; Bright v. Halloman (Tenn. 1881), 7 Lea 309; contra, Railroad Co. v. Commissioners (1878), 98 U. S. 541. A threatened seizure or arrest is not always necessary. Thus it has been held duress where the plaintiff was forced to pay before he could record his deed, State v. Nelson (1889), 41 Minn. 25, or before an estate could be administered, Markle v. Hennepin (1890), 44 Minn. 546, or as a condition precedent to doing business in the State, Ratterman v. Express Co. (1892), 49 Ohio St. 608; Western Union, etc., Co. v. Mayer (1876), 28 Ohio St. 521, or where the taxe became a prima facie lien upon the property. Thompson v. Detroit (1897), 114 Mich. 502. If other remedies are open to him as by injunction, Balfour v. Portland (1886), 28 Fed. 738, or replevin, Lumber Co. v. Manistee (1894), 100 Mich. 466; Lester v. Baltimore (1868), 29 Md. 415, 418; contra, Chegaray v. The Mayor (N. Y. 1853), 2 Duer 521, the payment is deemed voluntary. If the form of remedy is provided for by statute, the plaintiff must conform to its provisions. Osborn v. Danvers (Mass. 1827), 6 Pick. 98; see Eyerly v. Jasper Co. (1887), 72 Iowa 149.

Four considerations enter into a logical determination of the question. First, whether the tax was due in equity and good conscience; see Allentown v. Saeger (1853), 20 Pa. St. 421; second, whether the payment was voluntary or involuntary; see Taylor v. Board of Health (1855), 31 Pa. St. 73; third, whether it was made under mistake of fact or law; see Couch v. Kansas City (1894), 127 Mo. 436; and fourth, the rule of policy that orderly administration of government demands that money once in the hands of the State should remain there; see San Diego v. School Dist. (1898), 122 Cal. 98. The last element alone differentiates such cases from suits between private individuals. Although always present aiding a retention, it is evidently not controlling or taxes could never be recovered. Its function consists in swinging the balance when the other considerations conflict. The suit in question being one of an equitable nature, the first consideration should be fundamental and controlling. It is conceived that it is the true basis for denying a recovery of even an involuntary payment when the assessment is merely irregular. In such a case the other elements are immaterial. The same result may be reached if there is illegality and not mere irregularity. If the act be unconstitutional, good conscience should not deny a recovery where the payment was involuntary, and it being in legal contemplation a nullity, the fourth consideration alone faces the plaintiff; but this being of itself insufficient, as stated above, no basis remains for a retention. See Preston v. Boston, supra. But if the act be constitutional and the particular assessment illegal (not merely irregular) the question of good conscience may often become doubtful and here the fourth element should turn the scales against a recovery. Assuming that the tax cannot be said to be due in good conscience, the second consideration becomes important. At this point appears the illogical treatment of the subject in the cases. All the elements are confused, an equitable result being reached, and then placed on the basis that the payment was voluntary or involuntary. See Weston v. County of Luce (1894), 102 Mich. 528. This is the usual *ratio decidendi* in the irregular assessment cases, whereas the first element is really the controlling principle as discussed above. Whether the distinction between voluntary and involuntary payments be one purely of fact, see Mathews v. Kansas (1883), 80 Mo. 231, or whether it take the form of rules of law, as where the question of duress is dependent upon whether a cloud upon title is created, see Montgomery v. Cowlitz Co., supra, doubtful cases will arise. The logical method would then be to apply the fourth consideration to deny a recovery and not hold that the payment was "deemed" to be voluntary. In these borderline cases, the question of other available remedies finds its place. By a proper application of the preceding principles, the third consideration, that of mistake of law or fact, so difficult to apply, may often be avoided. Like the second consideration, it is greatly overworked in the cases, see Richardson v. City of Denver (1892), 17 Colo. 398, and like it, is often employed when

the first consideration is controlling, notably in the irregular assessment cases. A recent case in Kansas presented an interesting example of the manner in which these different considerations conflict. A taxpayer fraudulently neglected to declare her property. Thereupon she was assessed, but not within the time limit set by the statute in such cases. The power of the State to tax under that act was therefore gone. To prevent seizure and sale of her property under such illegal assessment, she paid the tax. The court permitted a recovery. Commissioners v. Lane (1907), 90 Pac. 1092 [76 Kans. 12]. The tax act being constitutional, but the assessment illegal and not merely irregular, the good conscience of the situation is at least arguable. But assuming good conscience to be doubtful, there is the element of involuntary payment demanding a recovery and the rule of policy forbidding it. It would seem that the latter should prevail and the decision erroneous unless it can be said that good conscience is entirely with the plaintiff, which result does not seem justifiable in view of the facts.[1]

[1] In many states there are remedies provided by statute for the refund of taxes paid upon illegal or erroneous assessments. For example, see New York Tax Law, § 296; U. S. Trust Co. v. Mayor, 144 N. Y. 488 (1895); Matter of Adams, 154 N. Y. 619 (1898); Matter of McCue, 162 N. Y. 235 (1900).

3. WAIVER OF TORT.

a. In General.

CROW v. BOYD'S ADMINISTRATORS.

17 Ala. 51.—1849.

Assumpsit.

Dargan, C. J.—The facts of this case, so far as they are material to the question raised by the bill of exceptions, are these: The plaintiff recovered in an action of detinue against one R. C. Boyd, a slave, and also damages for his detention. The slave was delivered up to the plaintiff in satisfaction of his value, as assessed by the jury, but the damages for the detention have not been paid, and the estate of R. C. Boyd, against whom the recovery was had, is insolvent. After the institution of the suit in detinue, the slave performed service for the defendant's intestate, in whose possession he remained for about two years; but it does not distinctly appear under what circumstances the slave went into his possession, but it is manifest that it was not by virtue of any contract with the plaintiff, nor with his assent.

The question arising out of the facts is, whether assumpsit will lie in favor of the plaintiff against the defendants to recover the value of the services or labor of the slave during the time he was in the possession of their intestate. It is contended that inasmuch as the defendants' intestate was liable to an action of trover or detinue because he had the possession of the slave, employing him as his own property, that the plaintiff may waive the tort and sue in assumpsit for the value of his labor. The action of assumpsit can be maintained only upon a contract, expressed or implied by law, and it will not lie to recover damages for torts or trespasses. It is true that if one convert the goods of another to his own use, and afterwards sell them and receive the money, an action for money had and received will lie against him at the suit of the owner. Upchurch v. Norsworthy, 15 Ala. 705. But the extent of this rule of waiving torts and bringing assumpsit is confined to this: If the wrongdoer has sold the goods and received the money, the owner may elect to affirm the sale and to claim the price at which they were sold. His title to the goods entitles him to the price received for them, and thus the wrongdoer is considered as having received the money for the use of the owner. But if there has been a mere conversion of the goods, without any sale of them, assumpsit will not lie to recover their value. Jones v. Hoar, 5 Pick. 285; Wellit v. Wellit, 3 Watts 277; Pritchard v. Ford, 1 J. J. Marshall 543; Sanders v. Hamilton, 3 Dana 552. I admit that cases may be found which hold that the owner may waive the tort and recover the value of the goods in an action of assumpsit, although the wrong-doer may not

have sold them. But when we reflect that the action of assumpsit will lie only upon a promise express or implied, and not to recover damages for torts or trespasses, we do not see upon what principle these decisions can be sustained. We must hold (if we sanction them) the broad principle that trover and assumpsit are concurrent remedies in all cases for the tortious conversion of the goods of another. This would be opposed to the first principles of pleading. The defendant is liable in an action of trover for the value of the services of the slave, but as it does not appear that he actually received any money for his labor (which might entitle the plaintiff to maintain assumpsit for money had and received) he can not be made liable in this form of action. Let the judgment be affirmed.[1]

[1] See Professor Corbin's article, "Waiver of Tort and Suit in Assumpsit," 19 Yale L. Jour. 221-246.

In Jones v. Hoar, 5 Pick. (Mass.) 285 (1827), the court says (p. 290): "The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds. See Gilmore v. Wilbur, 12 Pick. 124; 1 Chitty on Pl. (6th Amer. ed.), 113, 114. No case can be shown where assumpsit as for goods sold lay in such case, except it be against the executor of the wrongdoer, the tort being extinguished by the death, and no other remedy but assumpsit against the executor remaining. Such was the case of Hambly v. Trott [Cowp. 371]."

In Finlay v. Bryson, 84 Mo. 664 (1884), the court says (p. 670): "This right of election is very generally conceded to the plaintiff by the authorities, where his sole purpose is to maintain an assumpsit. So far as the defendant is concerned this right rests upon a fiction imposed at the plaintiff's pleasure upon the actual facts of misconduct of the defendant, which discloses no elements of a promise, contract or agreement. But when the *gravamen* of the transaction sounds in tort, the plaintiff will not be indulged in this fiction, if the effect of it is to give jurisdiction over the subject matter to a court which otherwise would not possess it. Sandeen v. R. R., 79 Mo. 278; or to bring the case within the terms of the statute which otherwise would not include it. Miss. Cent. R. R. v. Fort, 44 Miss. 423." Contra (as to Statute of Limitations) Lamb v. Clark, 5 Pick. 193 (1827); Whitaker v. Poston, 120 Tenn. 207 (1907); Robertson v. Dunn, 87 N. Car. 191 (1882); Kirchner v. Smith, 28 Ohio Cir. Ct. 45 (1905); but see also Nelson v. Petterson, 229 Ill. 240 (1907), and Birmingham v. C. & O. Ry., 98 Va. 548 (1900). The question is discussed by Professor Corbin in 19 Yale L. Jour, pp. 234-238.

KIDNEY v. PERSONS.

41 Vt. 386.—1868.

Prout, J.—This is an action of assumpsit, the declaration containing only the common counts. The question is whether the defendant is liable on the facts, as upon an implied promise to pay for the watch in controversy. The exceptions contain a meager statement of the case, disclosing merely that the plaintiff pawned or pledged the watch to secure the payment of a debt he was owing; that the defendant obtained the possession of it in right of the pawnee or pledgee, and sold it before he had a right for a harness, receiving no money in fact for either. Upon these facts, on the defendant's objection, the county court held that the plaintiff could not recover. Under this ruling the plaintiff became nonsuit with liberty to except.

Although the watch may not have been wrongfully *taken* by the defendant, he acquiring the possession in right of the creditor having a lien upon it, yet he wrongfully misappropriated or converted it by selling it, as if he was the absolute owner, for a harness. From the condition of the title and nature of the lien upon the watch, the defendant could acquire only the right and interest of the creditor or pawnee, who, as the case finds, had no right to sell it at the time it was sold, and thus defeat the plaintiff's right to a return of the specific article on payment of the claim for which it was pledged. It was held subject to this right as well as for purposes of security, and the relation of the parties in respect to the pledge was that of bailor and bailee in some sense. The pledgee or bailee having no right to sell the watch, as the case finds he did, the general owner may maintain trover, and in that action recover according to the value of his interest in the article, as the sale was wrongful and tortious. Sedgwick on Damages, 482; Jarvis v. Rogers, 15 Mass. 388; Stearns v. Marsh, 4 Denio 227; Morrill v. Moulton, 40 Vt. 242.

This is apparent from the facts as well as the nature of the legal remedy adapted to the injury, and which is open to the plaintiff. He puts his case upon this ground. The defendant claims that he acted upon a supposed right (which does not appear, and which, if it did, cannot affect the question) to treat the watch as his own property, and that he was not a *tortfeasor*. The case then comes to the question suggested by Bennett, J., in Stearns v. Dillingham, 22 Vt. 624, whether the plaintiff "can of his own mere motion waive the tort and sue in assumpsit" for the watch. Upon this question we do not question the general rule, that the owner of property wrongfully converted into money, may waive the tort and seek his remedy in assumpsit. This is settled in numerous cases. The principle rests upon the ground of a subsequent implied assent of the parties "to treat the

matter as resting in contract, which has relation to the time the goods or property was taken and wrongfully converted, and in legal effect amounts to a sale at the request of the defendant." Stearns v. Dillingham, *supra.* But there must be a conversion of the property into money or its equivalent. What then is money had and received or its equivalent in a legal sense? A solution of this question determines the case, and it is determined mainly by adjudicated cases.

The earliest case reported in this state that has come to our notice relating to that subject is Burnap v. Partridge, 3 Vt. 144. That was an action of assumpsit, and stood for determination upon the counts for money had and received. WILLIAMS, late C. J., gave the opinion, and in the course of it he remarks: "To support an action for money had and received, it must in all cases be made to appear that the defendant has actually received money to the use of the plaintiff, or that he has received that which *he* considered as equivalent thereto and accounted for it as such." Again, "the receipt of the money may sometimes be presumed. Thus when other property has been received which is salable, if it is not otherwise accounted for, the receipt of the money for the value of it may be presumed. * * * It is only declaring what may be evidence of this receipt." It is obvious from this language that the judge in stating the qualification of the general rule he has laid down, and which he takes occasion to say "does not militate against the principle, that money must actually have been received," refers to a matter of fact and not of law as the test. In the case put of the receipt of money or its equivalent, to charge the party on the latter ground, it must appear that he received that which was *considered* as equivalent to money and *accounted* for it as such. What is remarked by the same learned judge in Flower Brook Manufacturing Co. v. Buck, 18 Vt. 238, is entirely consistent with this view. The controversy in that case, which was an action on book, was in relation to some cloth manufactured by the plaintiff from wool furnished by the defendant, and for him, but which the plaintiff had not delivered. The judge says "the creditor was correct in his view of the case. The cloth was demanded and was not delivered; it has not been offered to the defendant, and there is no evidence that the plaintiff had it on hand, set apart and designated for him. The auditor therefore might with propriety consider that the *plaintiffs had appropriated the avails* of the cloth to their own use, either by sale or otherwise, and held them accountable" for the value or avails of the same, and upon this ground of inference of fact the court make the plaintiffs accountable. The question was again before the court in Scott v. Lance, 21 Vt. 507, which was also an action on book. The items in dispute in that case were several charges for manure. The defendant had given the plaintiff permission to draw away six loads and no more, but more were drawn away without consent or permission, as the case finds, under a pretended claim of right to it by the plaintiff as his own property. The auditor found the plaintiff's claim to it unfounded, and the question was whether the defendant could be allowed in that action for the manure thus

taken by the plaintiff. Upon the question the comments of POLAND, J., who gave the opinion, are to the purpose. He says the plaintiff's act seems to have been a direct tort, "for which the defendant's appropriate legal remedy would have been an action of trespass or trover." In that case it was urged, as in this, that it was permissible for the defendant to waive the tort and recover on an implied promise, but he says; "We do not understand this doctrine of waiving torts and suing in assumpsit ever to have been carried to this extent in this state. The farthest it has gone, has been, to allow the owner of property, which has been tortiously taken and converted into money, to maintain assumpsit for money had and received, against the wrongdoer; and this is founded mainly, as we think, upon the equitable ground which is said to be the foundation of that action, "that the defendant has money in his hands, which in equity belongs to the plaintiff. To carry the doctrine to the extent claimed would abolish all distinction between actions *ex delicto* and *ex contractu,* and we do not see any necessity for so wide a departure from what we deem to be the settled law on the subject." This case is followed by Stearns v. Dillingham, *supra,* in which BENNETT, J., says the law is too well settled to admit of discussion, and states the general rule in nearly the same terms, and so does REDFIELD, C. J., in Phelps et al. v. Conant et al., 30 Vt. 277, and ALDIS, J., in Elwell v. Martin and Trustee, 32 Vt. 217. The question was again before the court, as involved in the action on book in Drury v. Douglass, 35 Vt. 474. The struggle in that case related to some money delivered the defendant by the plaintiff to carry to another but which he did not. ALDIS, J., who gave the opinion, says the neglect or refusal to carry was a tort pure and simple. To hold that he could recover it on book "would be going quite beyond precedents (and they have gone quite as far in this direction as it is wise and safe to go) and would break down the distinction between forms of actions, between torts and contracts; a distinction existing in the relation of things, as well as in the artificial rules of pleading." This reasoning applies with equal pertinency and force in the present case, as there is no more reason why the distinction alluded to should be disregarded in the action of general assumpsit than in the action on book, the ground of recovery in both being *ex contractu.* See, also, Gilmore et al. v. Wilbur et al., 12 Pick. 120.

The doubt in relation to the question arises from the indefinite language used in expressing the rule found in the cases. As expressed, it is, that money or *its equivalent* must have been received by the defendant in order to maintain the action. But another class of cases often before the court indicate the sense and application of this language. When a party has received a promissory note or negotiable paper for property wrongfully taken and converted, or when property has been received in satisfaction of a money demand, in a legal sense it is equivalent to money; as illustrated in cases arising in favor of sureties against their principals, or as between co-sureties to compel a contribution. And when property has been disposed of

at a fixed price, or was purchased for the purpose of selling again, and a sufficient time has elapsed to accomplish that purpose and it is not otherwise accounted for, it might perhaps be treated as equivalent to money. Shepard v. Palmer, 6 Conn. 94; 2 Greenleaf Ev., § 118. But these cases stand upon ground peculiar to their special facts, and are rather exceptional than otherwise. The present case does not fall within the principle of that class of cases, but standing upon its naked facts, unaided by any pretense or inference that the defendant has received money for the watch, or that its sale for the harness was considered by the parties as resting in contract or consent, the judgment of the county court should be affirmed.[1]

WARE v. PERCIVAL ET AL.

61 ME. 391.—1873.

APPLETON, C. J.—This is an action of trespass for unlawfully taking and carrying away certain shares of the capital stock of the Maine Central Railroad Company, the property of the plaintiff.

The defendants are assessors of the town of Waterville. The plaintiff was assessed by them as one of its inhabitants. Not being one, the assessors had no jurisdiction. A warrant was issued in due form of law to the collector of said town, who seized and sold the stock in controversy, and paid over the proceeds of such sale to its treasurer. The property of the plaintiff having been seized and sold to pay an illegal assessment, the assessors having no jurisdiction, the plaintiff had two remedies, either of which he might pursue. He might sue the assessors in tort, or, waiving the tort, he might bring assumpsit against the town for the proceeds of the property sold. The damages are determined upon different principles, as the remedies pursued are in tort or assumpsit. Electing one of two forms of action, the party elects that his damages shall be determined by the rules which govern in assessing damages in the remedy adopted. The plaintiff, having his election as to the remedy to be pursued, brought his action of assumpsit, pursued it to judgment, and has received full satisfaction of the execution issued upon such

[1] In Miller v. Miller, 7 Pick. (Mass.) 133 (1828), which was assumpsit for money had and received, brought against a co-tenant who had sold growing trees and received real estate in part payment, the court said (p. 136): "In regard to the objection that the price of some of the wood was received in real estate, we think, as the sale was made for money, the defendant was answerable for the price when he discharged the purchaser, whether he received cash or anything else. He may be considered as the purchaser of the real estate with the money for which he sold the wood. The plaintiff consents to the sale for money, but not that real estate shall be substituted. Suppose, after selling the wood for money to be paid at a future day, the defendant had set off a debt which he owed the purchaser, for the price; he would virtually have received the money. So he has by taking the real estate."

had the goods, whether the plaintiff made a demand for them, and whether the plaintiff had the right to apply payments made to him by the lessee to other accounts. These were all questions of fact, upon which there was sufficient testimony to support the verdict.

---

i. *Unjust Enrichment.*

PATTERSON AND ANOTHER v. PRIOR.

18 IND. 440.—1862.

WORDEN, J.—Suit by Prior against the appellants, for work and labor. Judgment for the plaintiff. * * *

The cause was submitted to the court for trial on the following agreed statement of facts, which was all the evidence given in the cause, viz.:

"It is agreed in this case, that the plaintiff, said James Prior, was imprisoned in the state prison, in the custody of said Miller, as warden thereof, under and by virtue of a judgment of the Court of Common Pleas of Vanderburgh county, a certified copy of which judgment is filed with defendant's answer. That during his confinement he did work and labor as a criminal; said work and labor were of the value of two hundred and twenty-five dollars; said Patterson, during all the time of said Prior's confinement in said state prison, was the lessee thereof, and said work and labor were done by the order of said Miller, and said Patterson received all the benefit of said labor as such lessee. The time of said Prior's confinement commenced on the 12th of September, 1853, and he was discharged therefrom, and ordered to be returned to the sheriff of Vanderburgh county upon a writ of *habeas corpus,* by him sued out on the first day of January, 1855."

The question as to the sufficiency of the evidence to sustain the finding was properly presented on a motion for a new trial.

The appellants assign errors separately.

At the time the appellee was convicted and sent to the penitentiary, the Court of Common Pleas had no jurisdiction in that behalf; hence, the conviction and judgment were nullities, and furnish the appellants no protection for the tort committed in confining him in the penitentiary. Patterson v. Crawford, 12 Ind. 241. The appellants must be presumed to have known the law, and that they had no legal right to imprison the appellee, or cause him to labor. That they may have been responsible to him in some form cannot be doubted. They undoubtedly committed a tort, and the question here is, whether the tort can be waived, and an action maintained on an implied assumpsit?

We will first examine this question so far as it relates to Patterson. He, it seems, was the lessee of the penitentiary, and received

all the benefit of the appellant's labor. He must be presumed to have assented to the performance of the labor, and being benefited thereby, the law implies a promise to pay what it is reasonably worth. It was held in Patterson v. Crawford, *supra,* that where labor is performed for the benefit of a party without an express contract, if he knows it, and tacitly assents to it, he will be liable on an implied contract to pay a reasonable compensation therefor. In our opinion, so far as Patterson is concerned, the tort may be waived, and an action be maintained on the implied assumpsit. The case, however, is entirely different as to Miller, the warden of the penitentiary. He received no benefit of the plaintiff's labor, and not having been benefited, there is, as to him, no consideration to support an implied assumpsit to pay. The case of Webster et al. v. Drinkwater, 5 Greenl. R. 275, is much in point, where it was held, that "the party committing a tort cannot be charged as upon an implied contract, the tort being waived, unless some benefit has actually accrued to him."

Per Curiam.—The judgment against Miller is reversed, and against Patterson it is affirmed. Costs to be apportioned between Patterson, and Prior, the appellee.

LIMITED INVESTMENT ASSOC. v. GLENDALE INVESTMENT ASSOC. ET AL.

99 WIS. 54.—1898.

ACTION against the Glendale Investment Association, J. E. Griffin and others, to recover the consideration paid for certain lands sold by defendants to plaintiff. From a judgment for plaintiff, the association and Griffin separately appeal. Judgment against Griffin reversed.

BARDEEN, J.—* * * In this case, the facts as found by the jury, and which are fully supported by the evidence, are substantially that the Glendale Investment Association was the owner of a certain tract of land, which it authorized Clayton to sell for $2,700 per acre, and upon which it was to pay a commission of $200 per acre. Clayton, with full knowledge of the company, associated himself with Griffin and Pollock in the capacity of promoters, for the purpose of organizing a corporation to purchase this land. The plaintiff corporation was formed, Clayton and Griffin were elected directors and officers, and the land was purchased at $2,700 per acre; Griffin and Clayton carefully withholding any information from most of the subscribers for stock that they were to receive a rebate of $200 per acre for their mutual benefit. The defendant Glendale Investment Association, knowing of the organization and purpose of the corporation, and of the relation Clayton sustained to it, helped on

the deal, but, in order to clear its skirts, makes its contract to Clayton, and advises the assignment of it to the corporation. It then receives the money of the corporation, and forthwith returns to Clayton some $4,000 in alleged commissions. That this was a fraud upon plaintiff seems too clear for argument. As soon as these facts came to the surface, plaintiff tendered back what it received, and demanded its money. Upon the refusal to pay, plaintiff made its election to recover back the consideration paid. It might have chosen other remedies, as are pointed out in the Franey Case (96 Wis. 222); but, having elected to stand upon a rescission of the contract it is bound thereby.

An inspection of the complaint and the proceedings upon the trial lead at once to the conclusion that this action is based upon implied assumpsit, and is really an action for money had and received. Such being the case, it becomes important to inquire whether the recovery against the defendant Griffin can be maintained. The rule is quite elementary that, to enable a person to maintain an action for money had and received, it is necessary for him to establish that the persons sought to be charged have received money belonging to him or to which he is entitled. That is the fundamental fact upon which the right of action depends. Trust Co. v. Gleason, 77 N. Y. 400. The purpose of such an action is not to recover damages, but to make the party disgorge; and the recovery must necessarily be limited by the party's enrichment from the alleged transaction. Evidence of crooked dealing or fraudulent practices is only important in determining the plaintiff's right to secure the fund. While it may be admitted that all the defendants were joint tortfeasors, to the extent that they would be jointly liable for all *damages* the plaintiff has sustained by reason of their fraud, yet, when it is sought to render them liable on quasi-contract, a different rule prevails. The basis of recovery in the latter case being a loss on one side and a consequent enrichment on the other, liability can only exist in so far as these elements concur. There is no implied promise to pay damages. The promise that the law implies is that the guilty party will restore that which he has received, and which the other has shown himself entitled to. To the extent, therefore, which it is shown that the one party has suffered loss and the other gained profit, can the recovery in this form be sustained. The law does not imply a promise to pay for something the party has not received, while in the case of the tort it casts upon him an obligation to pay all damage done, regardless of a promise. Applying these observations to the facts before us, we find that every dollar of the money sought to be recovered in this action was paid to the defendant Glendale Investment Association by the plaintiff. Not one cent was paid to Griffin, or came to his pocket, except as it came through the Glendale Company to Clayton, and then to him. The amount received by Griffin was but a small fraction of the money paid by plaintiff to the Glendale Company. Plaintiff, suing as for a rescission of its contract, and

upon the implied promise to restore that which has been taken from it, is bound to look to the one to whom it paid the money. Cases may and do occur where the money sought to be recovered was received by one for the benefit of others, and where all interested in the fund would be jointly liable. But this is not such a case. The money paid by plaintiff to the Glendale Company was not paid for or on behalf of Griffin. It was paid on the contract, and as part of the purchase money of the land conveyed. There was no contract between plaintiff and Griffin to rescind, and hence no implied obligation can arise between them. The entry of judgment against Griffin for the full amount paid on the contract by plaintiff was manifestly wrong, and must be reversed. As bearing upon the questions hereinbefore discussed, we cite Barndt v. Frederick, 78 Wis. 1, 47 N. W. 6; Keener, Quasi-Cont. 200-202; Alger, Law Promot. § 99. * * *

The judgment of the superior court of Milwaukee county, as to the defendant Griffin, is reversed; and, as to the defendant Glendale Investment Association, the judgment is affirmed.[1]

---

ii. *Diminution of Plaintiff's Estate.*

SCHILLINGER ET AL. v. UNITED STATES.

155 U. S. 163—1894.

THIS action was brought in the United States Court of Claims for infringement of Schillinger's patent for the construction of pavements. The United States had given a contract to one Cook for constructing a pavement, who did the work. In actions against the United States the jurisdiction of the Court of Claims is limited by statute to those on "contracts, express or implied." Judgment in the Court of Claims was against the plaintiffs and they appealed to the United States Supreme Court.

BREWER, J.—[After holding that the action was in tort and not within the jurisdiction of the Court of Claims, and that the words "contract, express or implied," as used in the statute, do not include the quasi-contract that may be created by the waiver of the tort, proceeded to the following additional objection to plaintiff's recovery.]

But there is still another aspect in which this case may be considered. The patent of Schillinger runs to the mode of constructing concrete pavements. The mere form of a pavement with free joints —that is, in separate blocks—is not, since the filing of his disclaimer,

[1] Accord. Brundred v. Rice, 49 Oh. 640 (1892). See also, Reynolds v. Padgett, *post*, p. 617.

within the scope of this patent. It may be that the process or mode by which Cook, the contractor, constructed the pavement in the capitol grounds was that described in and covered by the Schillinger patent. He may, therefore, have been an infringer by using that process or mode in the construction of the pavement, and liable to the claimants for the damages they have sustained in consequence thereof. It may be conceded also that the government, as having at least consented to the use by Cook of such process or method in the construction of the pavement, is also liable for damages as a joint tortfeasor. But what property of the claimants has the government appropriated? It has and uses the pavement as completed in the capitol grounds, but there is no pretense of a patent on the pavement as a completed structure. When a contractor, in the execution of his contract, uses any patented tool, machine, or process, and the government accepts the work done under such contract, can it be said to have appropriated and be in possession of any property of the patentee in such a sense that the patentee may waive the tort, and sue as on an implied promise? The contractor may have profited by the use of the tool, machine, or process, but the work, as completed and enjoyed by the government, is the same as though done by a different and unpatented process, tool, or machine. Take, for illustration, a patented hammer or trowel. If a contractor in driving nails or laying bricks use such patented tools, does any patent right pass into the building, and become a part of it, so that he who takes the building can be said to be in the possession and enjoyment of such patent right? Even if it be conceded that Cook, in the doing of this work, used tar paper, or its equivalent, to separate the blocks of concrete, and thus finally completed a concrete pavement in detached blocks or sections, was such completed pavement any different from what it would have been if the separation between the blocks had been accomplished in some other way, and is the government now in possession or enjoyment of anything embraced within the patent? Do the facts, as stated in the petition or as found by the court, show anything more than a wrong done, and can this be adjudged other than a case "sounding in tort"?

We think not, and therefore the judgment of the court of claims is affirmed.[1]

[1] In Phillips v. Homfray, L. R. 24 Ch. D. 439 (1883), the claim was one for compensation "for the secret and tortious use made by the deceased R. Fothergill and others during his lifetime, of the underground ways and passages under the plaintiff's farm for the purpose of conveying the coal and ironstone of R. Fothergill and his co-trespassers." BOWEN, L. J., said the difficulties of extending the principle of waiver of tort "to the present case appear to us insuperable. The deceased, R. Fothergill, by carrying his coal and ironstone in secret over the plaintiffs' roads took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. *He saved his estate expense, but he did not bring into it any additional property or value belonging to another person."*

McSORLEY v. FAULKNER ET AL.

18 N. Y. SUPPL. 460 (COMMON PLEAS, GENERAL TERM).—1892.

DALY, C. J.—Upon the former appeal in this action it was held by the general term of this court that the plaintiff was not entitled to recover upon the facts then shown, viz.: That the plaintiff sold to defendants the business conducted by him at 1151 Ninth avenue; that in the premises at the time of the sale was a telephone, which had been previously placed there by the Metropolitan Telephone & Telegraph Company under a contract with the plaintiff, by which he was to pay monthly for its use for a stated period, not then expired; that after defendants went into possession the telephone remained in the premises and was used for the whole period (but by whom did not appear), and that plaintiff paid the company for such use $50, and then brought this action to recover that sum from defendants, as upon their implied request to pay for the use of the instrument. It was held by the general term that as the plaintiff made the original contract with the company, and the defendants were not privy to it, and were not under any liability to pay the company, in the absence of proof that the telephone was left in the premises at defendant's request, or that its use was necessary to, or was connected with, the business, or that there was any agreement between the parties in relation thereto, or that the defendants ever used the instrument, the plaintiff was not entitled to recover from them what he had to pay the company; and the judgment in plaintiff's favor was reversed, and a new trial was ordered. McSorley v. Faulkner, (Com. Pl. N. Y.) 14 N. Y. Supp. 789. Upon the second trial, it was shown that the defendants, from the time they took possession of the premises, used the telephone constantly for the whole period covered by the plaintiff's contract with the company. At the close of the plaintiff's case, the defendants moved to dismiss the complaint, and the plaintiff moved to conform the pleadings to the proof of a cause of action upon an implied contract for using the telephone as belonging to the plaintiff. The plaintiff's motion was granted, and, after the proofs on both sides were in, the justice rendered judgment in plaintiff's favor for $50 and costs. The ruling of the previous general term has settled the law of the case, that the plaintiff has not shown himself entitled to recover upon the ground originally claimed in the complaint, viz., an implied request to him by defendants to pay the company for their use of the instrument; for there was wanting the basis of such implication, *i. e.*, a primary liability of the defendants to the company, and a compulsion of law upon the plaintiff, growing out of the acts of the defendants (and not out of his own independent contract), to make the payment sued for. The company may have had the option to hold the defendants for the use of the telephone, and the services rendered in operating it for their benefit, upon an implied promise to

pay for such services, but this would have been an option to terminate the contract with the plaintiff, and would have discharged him for the two contracts could not subsist together; and any payment by plaintiff thereafter in behalf of defendants would have been voluntary, and not recoverable against them. First Nat. Bank of Ballston Spa v. Board of Sup'rs, 106 N. Y. 488-494, 13 N. E. Rep. 439. But the contract was not terminated by the company, and the plaintiff remained the licensee of the instrument and entitled to its use, and to the services of the company in transmitting communications through their office during the whole period of his contract. The use by defendants of the instrument and of these services was a use of the plaintiff's property, and it would seem just and reasonable to imply a promise on their part to pay the plaintiff for such use. They are chargeable with notice when they found the instrument upon the premises which plaintiff transferred to them, and when they began and continued to use it, that such use was not gratutitous, but involved an obligation of the licensee of the company to pay, and that they were enjoying the rights for which he was paying or was liable to pay. A duty to make him compensation arose from the circumstances, and a contract to do so will be implied. "In this sense, contract is co-ordinate and commensurate with duty; and it is a familiar principle of the law, which has a wide though far from a universal application, that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do. 'Implied contracts,' says Blackstone (2 Bl. Comm. p. 443), 'are such as reason and practice dictate, and which, therefore, the law presumes that every man undertakes to perform.' These contracts form the warp and woof of actual life." 1 Pars. Cont. 4. The absence of the essentials of ordinary contract relation will not affect the liability. "There is a class of cases where the law prescribes the rights and liabilities of parties who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contracts. * * * Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. Add. Cont. 22. And a somewhat similar distinction is recognized in the civil law, where it is said: 'In contracts, it is the consent of the contracting parties which produces the obligation; in *quasi* contracts, there is not any consent. The law alone or natural equity produces the obligation by rendering obligatory the fact from which it results. Therefore, these facts are called *quasi* contracts, because, without being contracts, they produce obligations in the same manner as actual contracts.' 1 Poth. Obl. 113, * * * So obligations are created in consequence of frauds or negligence, and in either case the law compels reparation and permits the tort to be

waived, but there is no contract." People v. Speir, 77 N. Y. 144-150. The defendants, by using the telephone constantly in their business, must have intended one of two things: to pay the person entitled to the use of the instrument as licensee the fair value of such use, which they engrossed in their business, or to defraud him. In neither case can an implied contract to pay be justly or lawfully denied.

It is not essential to the rights of the plaintiff to recover that he should have assented to the use of the instrument by defendants, or even have known of it. Rider v. Rubber Co., 28 N. Y. 379. In that case the plaintiff left with the defendants certain property, in the expectation that they would purchase it. The managing agent of the company found it on the premises, and, having use for it in the business of the company, took the responsibility of using it. It was held that, notwithstanding the fact that plaintiff did not give nor intend to give the use of the same to the defendant, the law implied an agreement by defendant to pay plaintiff the value of the use while the same was used in its business. A number of cases are cited by appellants, but none conflict with the view here taken of defendants' liability. There is no analogy between this claim and the claim for the use and occupation of real property, where the conventional relation of landlord and tenant must be shown (Collyer v. Collyer, 113 N. Y. 442, 21 N. E. Rep. 114; Crosby v. Horne & Danz Co., 45 Minn. 249, 47 N. W. Rep. 717; Reed v. Lammel (Minn.), 42 N. W. Rep. 202; In re Curtis' Will (Sup.), 16 N. Y. Supp. 180; McCrory v. Anderson (Ind. Sup.), 2 N. E. Rep. 213; Tanner v. Rummel, 24 Wkly. Dig. 149); or for the use of a patented device, which is an infringement upon a right and not the taking of property (Forehand v. U. S., 23 Ct. Cl. 477); or for work voluntarily performed (Ulmer v. Farnsworth, 80 Me. 500, 15 Atl. Rep. 65) or payments voluntarily made (City of Albany v. McNamara, 117 N. Y. 168, 22 N. E. Rep. 931); or a claim based upon estoppel (Bowers v. Smith (Sup.), 8 N. Y. Supp. 226); or an action at law by a subcontractor against the owner, for the value of materials furnished to the contractor, and used by the owner, which was, in effect, the nature of the claim made in Hogan v. City of Brooklyn, 52 N. Y. 282; or an action by a lessor against a lessee for an extra use of Croton water measured by a water-meter, where the covenant on the part of the lessee was to pay only the regular annual charge for Croton water (Moffat v. Henderson, 50 N. Y. Super. Ct. 211). It is, however, contended that the claim here made is analogous to that discountenanced in Loyd v. Fox, 1 E. D. Smith 101, where plaintiff, having been tenant of certain premises in the city of New York, under a hiring for a year, paid the charge for the use of the Croton water for that year, and having given up possession, after four months' occupancy, and the premises having been relet by the landlord for the residue of the year, claimed payment of the new tenant for the use of the Croton water for the unexpired period of eight months. But the plaintiff had no property in the water, nor in

the pipes upon the premises, and when he abandoned possession necessarily relinquished all his right; and defendant could not be held upon any implied promise to pay plaintiff for what plaintiff could not use or enjoy himself. But in this case plaintiff had the right to remove the telephone instrument and connect it wheresoever he removed to, and defendants, in enjoying the benefit of it while it remained upon the premises, were using the exclusive and undoubted property of the plaintiff.

Objection is made that there was no sufficient proof of the value of the use of the telephone during the period—four months—sued for. The plaintiff testified that it was worth $12.50 per month. It appears that his knowledge of the value was founded upon what he paid himself and knew that others paid. It is not easy to see what other or better evidence of value could be produced. Appellants do not suggest any. Persons hiring and using telephones in their business are competent to testify to the value of such use.

The judgment should be affirmed, with costs. All concur.

BROWN v. BROWN.

40 Hun, 418 (N. Y. Supreme Ct.).—1886.

Action to recover the amount obtained by the defendant under the circumstances stated in the opinion.

Landon, J.—This case was decided in favor of the defendant by the application of the well-settled rule, that where two rival claimants demand payment, each in his own right, of the debt which the debtor owes to one of them only, if the debtor pays the wrong claimant, the debt due to the rightful creditor is not hereby affected, and he acquires no title to recover the money of the party who wrongfully claimed and received it. Patrick v. Metcalf, 37 N. Y. 332; Butterworth v. Gould, 41 N. Y. 450. But this rule rests upon the basis that the wrongful claimant obtains the money upon his own independent claim; that in using his own he does not prejudice his competitors; that he does not exercise any right or title of which he has wrongfully divested his competitor; that he is not assuming any agency for him; that he is not in privity with him. Carver v. Creque, 48 N. Y. 385; Peckham v. Van Wagenen, 83 N. Y. 40; Hathaway v. Town of Cincinnatus, 62 N. Y. 434; Bradley v. Root, 5 Paige 632.

Here the defendant had made an absolute gift of the bank-book, and of the title to demand and receive the money represented by it, to the plaintiff. When the defendant, [afterward] by force and against the will of the plaintiff, took the bank-book from her, he knew that he had no title to it or the money represented by it. Whatever claim he might assert to the money he well knew rested upon his fraud, if not upon his crime. But he thus obtained the physical

power and apparent authority to represent the plaintiff in the presentation of the book to the bank, and by the act of presenting the book he did represent that whatever title or authority she had in the matter was exercisable by him, and he thus obtained the money.

He can take no advantage from his own wrong, and since he could not, in the absence of any title from the plaintiff, lawfully, as against her, obtain the money except as her agent, he may not, with the proceeds in his pocket, deny that he obtained them in the only manner in which he could lawfully obtain them.

It is probable the plaintiff could have maintained an action against the bank, since the bank had notice of her rights. But it was open to the plaintiff to elect to adopt the acts of the defendant or repudiate them. He shall not be heard to plead his own turpitude, and is therefore estopped to deny that he did not assume to act as the agent of the plaintiff. She may waive the tort, adopt his acts, and compel him to restore their fruits.

It comes to the same result if we regard the defendant as trustee *ex maleficio*. He knew that by his gift the book and the money it represented, and the rights it conferred, were the plaintiff's. He took the book by force, exercised her rights, and obtained the money. It was his duty to do nothing with her property and her rights for his own advantage, and he is, at her election, her trustee *ex maleficio* of the proceeds of his acts of usurpation. He held the proceeds of the book by same title that he held the book, and as he had no title to the book he had none to its proceeds, and must account to the true owner. Comstock v. Hier, 73 N. Y. 269.

The judgment should be reversed, new trial granted, referee discharged, costs to abide event.

BOCKES, J., concurred.

LEARNED, P. J.—I concur in this result on the ground that the defendant, by taking away plaintiff's property by force, committed a tort (trespass or trover) for which he became liable. He remains liable still; and the amount collected by him, being the amount of the indebtedness expressed in the book, is the measure of the damages to which she is entitled.

Judgment reversed, new trial granted, costs to abide event. Referee discharged.

---

iii. *Joint Tortfeasors.*

TERRY ET AL. v. MUNGER.

121 N. Y. 161—1890.

PECKHAM, J.—The plaintiffs commenced an action heretofore against two other persons, named, respectively, Kipp and Munger, on account of the same transaction for which this action was brought against the above-named sole defendant. The character of the com-

plaint in that action was before this court, and the case is reported in 88 N. Y. 629 [Goodwin v. Griffis]. The defendants in that case were charged with detaching and carrying away from the mill the machinery in question in that case, and also in this, and using it for themselves. It was there held, upon a perusal of the complaint, that the action was of a nature *ex contractu,* and not *ex delicto,* for the wrong done plaintiffs by the conversion of their property. As the defendants therein had not, after their conversion of it, themselves sold or otherwise disposed of the property which they acquired from the plaintiffs, the fiction of the receipt by defendants of money for the sale of the property, which *ex æquo et bono* they ought to pay back to plaintiffs, and which they therefore impliedly promised to pay back, could not be indulged in, and the position of the parties would have been at one time the subject of some doubt, whether there was any foundation for the doctrine of an implied promise in such case, or any possibility of the waiver of the tort committed by the defendants in the conversion of the property. In some of the states it has been denied, and such denial placed upon the ground that the property remained in the hands of the wrong-doer, and therefore, no money having been received by him in fact, an implied promise to pay over money had and received by defendant to the plaintiff's use did not and could not arise. Such was the case of Jones v. Hoar, 5 Pick. 285. But the great weight of authority in this country is in favor of the right to waive the tort, even in such case. If the wrong-doer has not sold the property, but still retains it, the plaintiff has the right to waive the tort, and proceed upon an implied contract of sale to the wrong-doer himself, and in such event he is not charged as for money had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrong-doer by the owner. If the transaction is thus held by the plaintiff as a sale, of course the title to the property passes to the wrong-doer, when the plaintiff elects to so treat it. See Pom. Rem. (2d ed.), §§ 567-569; Putnam v. Wise, 1 Hill 234, 240, and note by Mr. Hill; Berly v. Taylor, 5 Hill 577, 584; Norden v. Jones, 33 Wis. 600, 605; Cummings v. Vorce, 3 Hill 283; Spoor v. Newell, Id. 307; Abbott v. Blossom, 66 Barb. 353. We think this rule should be regarded as settled in this state. The reasons for the contrary holding are as well stated as they can be in the case above cited from Massachusetts (5 Pick.), and some of the cases looking in that direction in this state are cited in the opinion of TALCOTT, J., in the case reported in 66 Barb., *supra.* We think the better rule is to permit the plaintiff to elect, and to recover for goods sold, even though the tortfeasor has not himself disposed of the goods.

There is no doubt that the complaint in the former case, reported in 88 N. Y., proceeded upon the theory of a sale of the property to the defendants in that action, and it was so construed by this court, and we have no inclination to review the correctness of that decision. We have, then, the fact that the defendants in that action were sued

by the plaintiffs herein, upon an implied contract to pay the value of the property taken by them, as upon a sale thereof by plaintiffs to them. The plaintiffs having treated the title to the property as having passed to the defendants in that suit by such sale, can the plaintiffs now maintain an action against another person, who was not a party to that action, to recover damages from him for his alleged conversion of the same property, which conversion is founded upon his participation in the same acts which plaintiffs in the old suit have already treated as constituting a sale of the property? We think not. The judgment roll in the former action was received in evidence upon the trial of this case, against the objection of the plaintiffs, and notwithstanding the fact that the defendant herein was not a party to such action. It appears that all the facts surrounding the transaction as to the taking of the property were known to the plaintiffs at the time when they commenced their action on the implied contract of sale. The plaintiffs objected to the introduction of the judgment roll as incompetent and immaterial, and that there was no such defense set up in the answer.

The plaintiffs claim that the admission of such judgment violated the well-known general rule that a judgment is not binding upon any but parties and privies. We think the decision does not trench upon the rule in question. If the judgment had been introduced for the purpose of proving any fact adjudicated thereby, any fact in litigation therein, or which properly might have been so litigated, the rule would doubtless apply, and no such fact would or could be proved in favor of the defendant herein as against the plaintiffs by such judgment, because the defendant was not a party or privy to it. It was not by way of estoppel, however, that the judgment was admissible. It was admissible for the sole purpose of showing that the plaintiffs had elected to treat the taking of this property as a sale, and this was shown by a perusal of the complaint therein. Any decisive act of the plaintiffs, with knowledge of all the facts, would determine their election in such a case as this. Sanger v. Wood, 3 Johns. Ch. 416, 421. The proof that an action of that nature had been in fact commenced would have been just as conclusive upon the plaintiffs upon the question of election (proof of knowledge of all the facts at that time being given) as would the judgment have been. It was not necessary that a judgment should follow upon the action thus commenced. In those cases, where the commencement of an action has not been regarded as an election of remedies, the fact has appeared that the plaintiff at the time of its commencement was not aware of the facts which would have enabled him to elect, or, at least, it did not appear that he was acquainted with the facts when he commenced his action. Such is the case in Foundry Co. v. Hersee, 103 N. Y. 25, 9 N. E. Rep. 487. Here the plaintiffs knew all the facts when they sued the other defendants.

The case of Conrow v. Little, 115 N. Y. 387, 393, 22 N. E. Rep. 346, is to the effect that the commencement of the action, where all the facts are known, is conclusive evidence of an election. Judge

DANFORTH in that case, in speaking of plaintiff's election to affirm or avoid the contract therein spoken of, said the plaintiffs could affirm or rescind it. "They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract." It was also held that the discontinuance of that action was immaterial. It was the fact that the plaintiffs once elected their remedy and acted affirmatively upon such election that determined the issue. After that the option no longer existed, and it was of no consequence, therefore, whether the plaintiffs did or did not make their choice effective. When it becomes necessary to choose between inconsistent rights and remedies, the election will be final, and cannot be reconsidered, even where no injury has been done by the choice, or would result from setting it aside. 2 Herm. Estop., p. 1172, § 1045.

The plaintiffs having, by their former action, in effect sold this very property, it must follow that at the time of the commencement of this one they had no cause of action for a conversion in existence against the defendant herein. The transfer of the title did not depend upon the plaintiffs recovering satisfaction in such action for the purchase price. It was their election to treat the transaction as a sale which accomplished that result, and that election was proved by the complaint already referred to. But it is urged that this election of the plaintiffs is not binding upon them in favor of the defendant herein, because it was only against the defendants in the other action that they made their election. It is said there is no case to be found where an election has been treated as binding in favor of a stranger to the transaction, and that the defendant herein is such stranger so far as the plaintiffs' transaction with the defendants in the other action is concerned. I do not think this claim can be maintained. In the first place, what is the nature of the plaintiffs' act in electing to consider the transaction as a sale? It is a decision or determination upon their part to, in effect, ratify and proclaim the lawfulness of the act of taking the property, and it is an assertion on the plaintiffs' part that in so doing the plaintiffs' interest in the property was purchased, and that thereby their whole title was transferred, and they ceased to own any part of the property, and that those who took it impliedly promised the plaintiffs to pay them the value of their interest in such property. This being so, why does not such transfer of title bind the plaintiffs as to the whole world? Surely, the title which plaintiffs once had in the property cannot at the same time rest with them and pass to those who took it. If the title really once passed, that would be a fact actually existing, which anybody ought to have the right to prove if it became material in protecting his own rights, unless there were some equitable considerations in such case which should prevent it. I cannot see that any exist here.

With full knowledge of all the facts the plaintiffs deliberately elected to treat the transaction in which this defendant's share was

well known, as a sale of the property, and now they propose to recover from this defendant damages for the conversion by him of the very same property which they have already said they sold, by virtue of the very transaction which they now claim amounted to a conversion of the property by this defendant. Why should the defendant not be permitted to set up such sale as a complete defense to this action? The plaintiffs have done nothing by reason of defendant's acts which should estop him from setting up this defense. Their situation has not since been altered for the worse by anything the defendant has done. If not, then the fact that the plaintiffs sold the property by virtue of the transaction which they now seek to treat as a conversion of it by this defendant, must and ought to operate as a perfect bar to the maintenance of this action. And this is not in the least upon the principle of equitable estoppel. It is upon the principle that the plaintiffs, by their own free choice, decided to sell the property, and, having done so, it necessarily follows that they have no cause of action against defendant for an alleged conversion of the same property by the same acts which they had already treated as amounting to a sale.

In Conrow v. Little, 115 N. Y. 387, 22 N. E. Rep. 346, already cited, the plaintiffs' election to affirm the contract between them and Branscom, evidenced by their commencement of the attachment suit, was held conclusive upon them, and the defendants were permitted to take advantage of such election, although they were not parties or privies to the plaintiffs' suit against Branscom. The defendants were enabled to take advantage of it because such election showed that the plaintiffs had affirmed their contract with Branscom, and the plaintiffs' suit against defendant Little could only be maintained upon the assumption that such contract had been rescinded. If the other suit had gone to judgment, would not such judgment have been admissible for the purpose of showing the naked fact of the election of plaintiffs to affirm the contract? I have no doubt of it. In Fowler v. Bank, 113 N. Y. 450, 21 N. E. Rep. 172, we held that the action could not be maintained, because the plaintiff, by suing the party to whom the bank had already wrongfully paid the money, elected to regard such payment as rightfully made, and a cause of action against the bank to recover against it the amount of its former indebtedness to the plaintiff was held to have been forever abandoned because of such election. In that case, in order to prove the fact of election, the defendant proved the commencement of the former action by the plaintiff, and it was proved, as we assume, by the production of the judgment roll in such former action. It was admissible for the same purpose for which the judgment was admissible in this case, viz., to prove the fact of the plaintiff's election to pursue a totally inconsistent remedy. The defendant was not precluded from availing itself of such defense, although it was neither a party nor privy to the judgment which proved the fact of such election. In Bank v. Beale, 34 N. Y. 473, the plaintiff put in evidence a judgment roll in which it was neither a party nor privy, to

show that Sweet had made an election therein which bound him, and consequently the defendant Beale. This court held the judgment conclusively proved the election.

These views are fatal to the maintenance of this present action for a conversion against the defendant. If the plaintiffs herein had commenced their action against this defendant, based upon an implied promise by him to pay the value of the property as upon a sale thereof to him in connection with the defendants in the other suit, a totally different question would have arisen, upon which we express no opinion. The plaintiffs in such action might urge that it ought to be sustained upon the ground that the defendant herein was one of the wrong-doers in the transaction resulting in the taking of this property, and that the tort therein committed by him and the defendants in the other suit was a joint and several one, for which they were jointly and severally liable; and when the tort was waived by the plaintiffs, and an implied contract was based upon such waiver, the contract implied was of the same nature as the tort which was waived, and was a joint and several contract.[1] Being a joint and several contract, an action against the other defendants upon their several contract, and a recovery of judgment without satisfaction, would constitute no defense to an action against this defendant, based upon his several and implied contract to pay the value of the property. There may be some authority for this course of reasoning. City Nat. Bank v. National Park Bank, 32 Hun 105. We neither affirm nor deny its soundness, and only refer to it in order to repel any possible implication that in this decision we have held that no such action could be maintained. But, even if such an action would lie, we cannot turn the present one for a conversion of the property into one to recover the value thereof as upon a sale to defendant. People v. Dennison, 84 N. Y. 272; Romeyn v. Sickles, 108 N. Y. 650, 15 N. E. Rep. 698. As to the other ground of objection taken by the plaintiffs, we think the evidence was admissible, for the reasons stated by the learned judge at general term. Upon the whole case we are satisfied that no error was committed prejudicial to the plaintiffs, and the judgment should be affirmed, with costs. All concur; RUGER, C. J., and ANDREWS, J., in result.[2]

[1] So held in Hart v. Goadby, 72 N. Y. Misc. 232 (1911).

[2] Contra, Huffman v. Hughlett & Pyatt, 11 Lea (Tenn.) 549 (1883), the court saying (p. 554): "If the action be in contract, it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but, as Nicholson, C. J., has more accurately expressed it, a waiver of the 'damages for the conversion,' and a suing for the value of the property. Kirkman v. Philips, 7 Heis. 222, 224. It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrongdoers unimpaired until he has obtained legal satisfaction. It it were otherwise, the suing of any one of a series of tortfeasors, even the last, on the implied promise, where there was clearly no contract, would give him a good title and release all the others. No authority has been produced sustaining such a conclusion, and we are not inclined to make one."

FLOYD v. BROWNE, Administrator.

1 Rawle (Pa.) 121.—1829.

Action of assumpsit for money had and received, brought by the plaintiff in error, John Floyd, against the defendant in error, Aquilla A. Browne, administrator *de bonis non cum testamento annexo* of Thomas Truxton, deceased, who, in his lifetime was high sheriff of the city and county of Philadelphia.

The following were the circumstances upon which the plaintiff's claim was founded: To March term, 1819, of the district court, Caleb Cridland issued a *fieri facias* against a certain George Green. The sheriff levied upon goods belonging to the plaintiff (Floyd), and sold them for the gross sum of $1,235.94. In making the levy Benjamin Cridland, Robert Black, Peter Care, Jr., Stephen E. Fotterall and George F. Alberti, assisted the said Caleb Cridland. Floyd brought an action of trespass *vi et armis*, against Benjamin Cridland, and the others who assisted him in the levy, and obtained a verdict and judgment for $2,000 against Caleb and Benjamin Cridland, and signed judgment by default against Robert Black, Peter Care, Jr., Stephen E. Fotterall and George F. Alberti, the other defendants. Execution was issued against all these defendants, and the money made out of the goods and chattels of Fotterall. Fotterall removed th record by writ of error to the supreme court; where, on the 2d of April, 1821, the judgment was reversed as to all the defendants except Caleb and Benjamin Cridland, and the execution as to all. (See 6 Serg. & Rawle 412.) On the 19th of May, 1821, Floyd brought this action against the sheriff to recover the proceeds of the sale of his goods wrongfully taken in execution. The defendant pleaded *non assumpsit* and payment, and a special plea of former recovery, which set forth the proceedings in the district and supreme court, above stated, in the suit brought by Floyd against Caleb Cridland and others. To this plea the plaintiff demurred, and the court below gave judgment for the defendant on the demurrer. The plaintiff thereupon took out a writ of error.

Gibson, C. J.—A plaintiff is not compelled to elect between actions that are consistent with each other. Separate actions against a number who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty are consistent, being concurrent remedies. Trespass is, in its nature, joint and several; and in separate actions against joint trespassers, being consistent with each other, nothing but actual satisfaction by one will discharge the rest. So far the law is clear. Here, then, the plaintiff had impleaded six jointly, and obtained judgment, but without actual satisfaction against two, and he now brings *indebitatus assumpsit* against a seventh for the price obtained for the goods which were the subject of the trespass. The point of defense mainly

relied on is that the plaintiff's property in the goods was divested by the former recovery; and, consequently, that he cannot maintain an action founded exclusively on property in the goods or the price of them. It is not easy to see how this is to be answered. It will not do to say that the present, though differing in form, is in substance an action to recover satisfaction for a trespass, and consequently that the form is immaterial. There is, in fact, a substantial difference. The cause of action in trespass and in assumpsit is as distinct in substance as the actions are different in form. Trespass lies only for an injury to the possession; and damages are recoverable for the taking, which is the gist of the action, separately from the value of the goods, the asportation being a circumstance merely of aggravation. *Assumpsit* lies for money received as the price of the goods, to the plaintiff's use, the detention of which is the gist of the action, the trespass being waived, and not entering at all into the estimate of the damages, it being well settled that nothing is recoverable beyond what was actually received. If there were no difference as to substance, and the form of the remedy were immaterial, a plaintiff might have several actions of *assumpsit* against those who had jointly sold his goods, on the ground of their having been obtained by a trespass, although the promise which the law implies from a joint receipt of the price is also joint. He certainly might just as well proceed severally in *assumpsit* against all, as in trespass against some, and in *assumpsit* against the rest. But there is this further substantial difference that the action in the one case is founded on a contract which survives, and in the other, on a tort, which, at the common law, does not. In fact, the attempt here is to make an administrator liable. A plaintiff must proceed consistently. He cannot waive a part of the injury to give form to his action and resume it to give substance. In waiving the trespass he dispenses with whatever could give character to the injury as such, and treats as a substantive and distinct cause of action what would, in an action of trespass proper, be merely a circumstance of aggravation. In an action of assumpsit, therefore, he cannot claim the benefit of any of the incidents or attributes which appertain to an action of trespass. The consequence is, that the plaintiff here having recovered in trespass, cannot again recover in an action which is not a concurrent remedy; a recovery in trespass producing the same bar that is produced by a recovery in trover, against a recovery in assumpsit of the price of the same goods.

Judgment affirmed.

iv. *Injured Tenants in Common.*

TANKERSLEY v. CHILDERS ET AL.

23 ALA. 781.—1853.

PHELAN, J.—The action was *assumpsit* by three of the Childers to recover of the defendant their portion of the proceeds of the cotton which was sold by him as constable under an execution against David Childers, who, together with one Smyth and the plaintiffs, was a tenant in common of the cotton which he sold. The right of the plaintiffs to waive the tort, the conversion, and sue in *assumpsit* is not denied. But it is insisted by plaintiff, in error, that in this form of action all the parties in interest must join in action, and that they cannot sue if any number less than all join as plaintiffs. This question of the right of any one tenant in common to waive a tort and sue separately in *assumpsit* was considered in the case of Smyth v. Tankersley, 20 Ala. 212, when we held that such right existed. The general doctrine on this subject of non-joinder of plaintiffs, or the right to sue separately where the tort is waived, and parties sue in *assumpsit,* has since received a careful examination anew in the case of Smith's Ex'rs v. Wiley, 22 Ala. 396. The court in that case arrive at the conclusion, as the result of sound reason and the best authorities, that when a conversion has been committed against several, all the parties in interest waiving the tort may join, if they like, in an action of *assumpsit;* but, that they are under no legal compulsion to do so, for that any number less than all, or any separate one, may bring *assumpsit* for his or their share of the interest without joining the rest. * * * *[1]

---

b. PARTICULAR APPLICATIONS.

i. *Fraud.*

CROWN CYCLE CO. v. BROWN.

39 ORE. 285.—1901.

WOLVERTON, J.—The amended complaint herein, omitting formal allegations, runs as follows: "That on or about the 1st day of March, 1896, the plaintiff, at the special instance and request of the defendant, sold and delivered to defendant certain goods, wares, and mer-

[1] But see Gilmore et al. v. Wilbur et al., 12 Pick. (Mass.) 120 (1831), the court saying (p. 124): "Tenants in common not only may, but must join in an action for any entire injury done to the common property. And this principle is equally applicable to an action for the tort, and to an action of assumpsit when the tort is waived."

chandise, of the reasonable value of $12,234." The answer denies that the plaintiff sold or delivered to the defendant any goods, wares, or merchandise whatever, except under a special contract of purchase and sale between them, which provided for the payment of a stipulated price at a time certain, which had not elapsed at the commencement of the action. It is further alleged that the goods, wares, and merchandise mentioned in the complaint consist of three lots of bicycles, which were purchased by the defendant from the plaintiff under a special contract as to price, terms, and time of payment; and that, in pursuance of the terms of the contract, the defendant executed and delivered to the plaintiff, as and for the whole of the purchase price of said bicycles, certain bills of exchange, which were received and accepted by plaintiff, and are still held and retained by it. The plaintiff replied that the goods were procured and said contract was induced through the fraudulent and deceitful representations of the defendant as to the condition of his credit; that the said bills of exchange were taken and accepted under those conditions, and are wholly worthless. There was a demurrer interposed to the reply, and a motion to strike out the affirmative averment, which were both overruled. The verdict and judgment being in favor of the plaintiff, the defendant appeals. * * * *

The most important question attending this controversy is whether the plaintiff can waive the tort and sue in assumpsit for goods sold on a *quantum valebat.* Upon this question the authorities are in hopeless conflict, and we will make no attempt to reconcile or distinguish them. The action is for the reasonable value of the bicycles, not for an agreed price, so that there is no attempt to sue upon the contract, which it is alleged was fraudulently obtained, or to adopt any of its terms as controlling in any particular or binding upon the parties to the action. Fraud having vitiated the contract, and rendered it voidable, at the election of the plaintiff, it had proceeded by an action in no wise adapted to its enforcement, and thereby it would seem to logically follow that it has proceeded in its disaffirmance. At any rate, the action which it has employed is wholly inconsistent with the existence of the specific contract, so that it cannot be said that by suing in assumpsit it has affirmed any contract that it may have had with the defendant, except the one which may be implied from the acts of the parties. In a leading case upon the subject (Roth v. Palmer, 27 Barb. 652, 656), HOGEBOOM, J., discussing the effect of the waiver of the tort, says: "Does it restore the express contract which has been repudiated for the fraud, or does it leave the parties in the same condition as if no express contract had been made, to such relations as result, by implication of law, from the delivery of the goods by the plaintiffs and their possession by the defendant? On this subject the decisions are conflicting, but I think the weight of authority, as well as the true and logical effect of the various acts of the parties, is to leave the parties to stand upon the rights and obligations resulting from a delivery and the possession of the goods." The proposition is supported by Wilson v. Foree, 6

Johns. *110, Pierce v. Drake, 15 Johns. 475, and other New York authorities, as well as by Dietz's Assignee v. Sutcliffe, 80 Ky. 650,—a case in all particulars like the one at bar. To the same purpose, see Pom. Code Rem. (3d ed.), § 571; Bliss, Code Pl. (3d ed.), § 15. Whether the vendor may waive the tort until his artful vendee has disposed of the goods and converted them into money is another phase of the question, touching which the authorities are not agreed. There are many of great weight holding that he can. Galvin v. Milling Co., 14 Mont. 508, 37 Pac. 366; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Roberts v. Evans, 43 Cal. 380; Norden v. Jones, 33 Wis. 600; Assurance Co. v. Towle, 65 Wis. 247, 26 N. W. 104; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981; Gordan v. Bruner, 49 Mo. 570; McCombs v. Church & Co., 9 Lea 81; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272; and Challiss v. Wylie, 35 Kan. 506, 11 Pac. 438. We are inclined to adopt the doctrine of the foregoing authorities as establishing the better rule, namely, that a vendor who has been induced by fraud to part with his goods to a purchaser on a time consideration may, before the same becomes due, sue in assumpsit for their reasonable value, and this before the vendee has converted the same into money. We may say that we are impelled somewhat to this conclusion by a cause of some analogy heretofore decided by this court. We refer to Gove v. Milling Co., 19 Or. 363, 24 Pac. 521, wherein it was held that "when one performs services for another on a special contract, and for any reason, except a voluntary abandonment, fails to fully comply with his contract, and the services and material have been of value to him for whom they were rendered and furnished, he may recover for such material and services their reasonable value, after deducting therefrom any damages the party for whom such materials were furnished and services were rendered has sustained by reason of such failure." The quotation is from the headnote.

There was no attempt on the part of the plaintiff, prior to the institution of the action, to formally rescind the contract, nor was there any offer to return or to surrender the acceptances received in consideration of the sale, but the plaintiff proffered to return them in its reply and at the trial. As against the right of recovery by this method, it is urged that no action accrued to the plaintiff for the reasonable value of the goods until the specific contract was rescinded, and there was an offer to return the acceptances, and that the present action was prematurely brought, to say the least. There is ample authority, however, for proceeding by the method adopted. Ryan v. Brant, 42 Ill. 78; Nichols v. Michael, 23 N. Y. 264; Wigand v. Sichel, 33 How. Prac. 174; Claflin v. Taussig, 7 Hun 223. The authorities seem to be uniform that, where the action is for the recovery of specific property, the tender of return of such acceptances should be made as a condition precedent to the bringing of the action, as the vendee must be placed in *statu quo* before the vendor is entitled to take it from him, consequently he has no right of action until the tender is made; but there is a distinction recognized by

these same authorities, that where the party proceeds in trespass, or on a *quantum valebat,* the rule does not apply. Doane v. Lockwood, 115 Ill. 490, 4 N. E. 500. These considerations affirm the judgment of the court below; and it is so ordered.[1]

SCHANK v. SCHUCHMAN.

212 N. Y. 352.—1914.

The following question was certified: "Does the amended complaint herein state a cause of action against the defendant?"

CARDOZO, J.—The plaintiffs bought of the defendant wagons and parts of wagons, and also employed him to make repairs. Their dealings continued for nearly four years. In that period, the plaintiffs paid for repairs $39,626.66, and for new wagons or fittings $6,027.48, a total of $45,654.14. During all that time, two men, in the plaintiffs' service, were charged with the duty of inspecting purchases and repairs, and payment was not made till they had furnished their certificate of approval. It is charged in the complaint that they received from the defendant a bonus or commission of ten per cent. of the bills which they approved. It is charged that the payment was made to them "with intent to influence their action in relation to the business of the plaintiffs." When these wrongs came to the plaintiffs' knowledge, they could no longer restore to the defendant the benefits received from him. The work could not be restored: it had been incorporated into the wagons which had since then been worn out or destroyed. The wagons and parts of wagons could not be restored: they also were worn out and useless. The plaintiffs say that in this predicament every dollar paid by them to the defendant during the years of their dealings must be repaid without deduction or condition. They ask that all the transactions be set aside; that the contracts under which the payments were made, be declared to be

[1]Accord, Limited Invest. Assoc. v. Glendale Assoc., ante, p. 587.

Contra, Kellogg v. Turpie, 93 Ill. 265 (1879), and Bedier v. Fuller, 106 Mich. 342 (1895), the court in the latter case saying (p. 348): "We think the case is ruled by Galloway v. Holmes, 1 Doug. (Mich.) 330, and Emerson v. Spring Co., 100 Mich. 127, 58 N. W. 659. One who has been induced by the fraudulent representations of another to enter into a contract may affirm or disaffirm it. If he disaffirm, and assert the fraud, he cannot, in the same action, turn it into an action of assumpsit, and recover as for an implied promise. As was said in Emerson v. Spring Co., supra: 'It is suggested that, as a fraud was perpetrated upon the creditor, he would have the right to waive the tort and sue in assumpsit; but we are aware of no case which authorizes a party to first turn a contract into a tort, and then shift it back into the form of a new contract, other than the original one.' The cases above cited are so squarely in point that we deem further discussion of the question unnecessary. The judgment below must be affirmed." In 1897 an act was passed permitting fraud to be waived and assumpsit to be brought for damages. Howell's Mich. Statutes, (1915), § 13954.

void; and that the defendant be required to repay all moneys which he has received, with interest from the dates of payment. This action is not the first in which the plaintiffs have sought redress from the defendant for the wrongs stated in their complaint. [The court then rehearses the previous course of the litigation.]

The present action, like the earlier one, is, therefore, in reality, for money had and received. That is always the legal remedy available where a defrauded purchaser, waiving the tort, elects to rescind and to reclaim his payments. Rothschild v. Mack, 115 N. Y. 1, 8. The action for money had and received is based, however, upon equitable principles. The plaintiffs must show that it is against good conscience for the defendant to keep the money. Moses v. Macferlan, 2 Burr, 1005. They do not show this, where they have consumed what they have received, unless the money exceeds the fair value of that which the defendant gave them. If the defendant's work and wares were paid for at fair prices, the plaintiffs have had a just return for every dollar they have parted with, and the defendant, therefore, can keep the money with good conscience. An apt instance of the application of these principles is found in the case of Western Assurance Co. v. Towle, 65 Wis. 247. There the plaintiff had paid to the defendants $1,000 upon a policy of insurance against fire. The payment was procured by false representations and false swearing as to the extent of the loss, which, if seasonably discovered, would have worked a forfeiture of the policy. The court held that in an action for money had and received, the plaintiff could recover "so much only as the amount paid exceeded the actual loss sustained by the insured. The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendants, they can only recover back so much as in equity and good conscience they ought not to have paid."

The plaintiffs argue that the defendant was guilty of the crime denounced by section 439[1] of the Penal Law, and that if he were now suing for the price, the court would refuse to help him. Sirkin v. Fourteenth Street Store, 124 App. Div. 384. That question is not here and we do not attempt to pass upon it. * * * *

The plaintiffs invoke the authority of a line of cases in which it has been held that a victim of a fraud, who is unable, because of changed circumstances, to make restoration to the wrongdoer of benefits received, may still, under certain conditions, recover what he has paid. Masson v. Bovet, 1 Denio 69; Hammond v. Pennock, 61 N. Y. 145; Butler v. Prentiss, 158 N. Y. 49, 64; Heckscher v. Edenborn, 203 N. Y. 210, 228. In none of these cases, however, was it held that a plaintiff is absolved from the duty of making allowance for benefits received, where his inability to restore them arises from the fact that he has himself had the complete enjoyment of them, and in so enjoying has consumed them. In all such cases it

[1]Anti-tipping statute.

will be found that the destruction of that which the plaintiff must otherwise have returned, was due to causes which made it equitable that the loss should fall on the defendant. Thus, in Henninger v. Heald, 51 N. J. Eq. 74, the plaintiff bought the defendant's land. It was subject to a mortgage, which was afterwards foreclosed. It was held that the loss of the land through the foreclosure did not defeat an action to rescind the sale for fraud. If any surplus had resulted from the foreclosure, the plaintiff would have been required to allow it to the defendant, and if there was no surplus, there was nothing that the plaintiff ought equitably to be required to restore. It is needful, therefore, that we distinguish between the causes from which the inability to make restitution arises. If the plaintiffs were sellers and not purchasers, and were suing to recover a horse because of fraud in the procurement of the sale, it would not be contended that they would be excused from repaying the money because they had themselves spent it. The court, in determining the extent to which changed conditions may relieve from the duty of restoration, must weigh the equities of each case, and exact such conditions of reimbursement or allowance as just dealing demands. Butler v. Prentiss, supra.

We think, therefore, that the plaintiffs, admitting, as they do, that they have received property and services of value, which they have wholly consumed, must show, in order to reclaim the money, that its retention by the defendant is against good conscience, and that they do not show this in the absence of an allegation of some disparity between the value and the price.

The order should be affirmed, with costs, and the question certified answered in the negative.

WILLARD BARTLETT, Ch. J., WERNER, HISCOCK, CHASE, HOGAN and MILLER, JJ., concur.

Order Affirmed.[1]

---

ii. *Money Procured Wrongfully and Passed to an Innocent Holder.*

STEPHENS v. BOARD OF EDUCATION OF BROOKLYN.

79 N. Y. 183.—1879.

ANDREWS, J.—There is no dispute as to the material facts. On and prior to the 18th of December, 1871, one Gill was a member of the board of education of the city of Brooklyn, and, as attorney

[1]See Moore v. Mutual Reserve Life Fund Assoc., 121 N. Y. App. Div. 335 (1907), prevailing and dissenting opinions, for a discussion of restitution by an insured who seeks rescission at law and recovery of premiums, on the ground of the insurer's fraud. And see also cases, ante, p. 177, for restitution where rescission is sought at law for breach of contract.

for said board, received $3,600.84, the money of the board, which he wrongfully converted and appropriated to his own use. Soon after the date mentioned, he procured from the plaintiff, on a mortgage forged by him on the property of a third person, $4,129.34 in a check of the plaintiff, which, on the 21st of December, 1871, he deposited in a bank, to his credit, and on the same day drew his own check on the bank in which the deposit was made, to the order of the board of education for the amount of the money fraudulently appropriated by him and delivered the same to the board, and the board thereupon credited the check to Gill in discharge of his debt. The check was paid in due course, and the money received thereon was used by the board in its business. The plaintiff, about two months thereafter, ascertained that the mortgage received from Gill was a forgery, and then demanded from the defendant the money received from Gill. The defendant had no notice, when it received the check from Gill, of the fraud by which he obtained the money of the plaintiff, nor had it any information as to the source from which the money to his credit in the bank was derived. The first information which the defendant had of the facts in respect thereto was at the time of the demand made by the plaintiff, before referred to.

The question is presented whether, under these circumstances, the plaintiff can maintain an action to recover the money received by the defendant from Gill and applied in payment of the debt owing by him to the defendant. We are of opinion that the action will not lie. The money having been obtained by Gill from the plaintiff by fraud and felony the former acquired no title thereto, and the plaintiff could recover it from Gill if found in his possession, or he could follow it into the hands of any person who received it from Gill without consideration, or with notice of the fraud by which he obtained it. The money, when deposited by Gill in the bank, was still the money of the plaintiff. The bank was a mere depository, and while it so remained the plaintiff could have compelled the bank to restore the money to him as the rightful owner. Tradesman's Bk. v. Merritt, 1 Paige 302; Mechanics' Bank v. Levy, 3 id. 606; Pennell v. Deffell, 4 De Gex, M. & G. 372. But the bank, having paid it out on the check of Gill without notice of any defect in his title, was thereafter protected against any claim of the plaintiff therefor. The plaintiff, however, passing by the bank to whose possession the money first came from Gill, claims to recover of the defendant on the ground that the defendant, having received it from Gill in payment of an antecedent debt, cannot be permitted to retain it as against the plaintiff. No authority has been cited which sustains this position. The rule has been settled by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it *bona fide* and for a valuable consideration in the due course of business. This, said Lord HOLT in 1 Salk. 126, is "by reason of the course of trade which creates a property in the assignee or bearer"—and in Miller v. Race (4 Burr. 452), Lord MANSFIELD said: "The true reason

is upon account of the currency of it; it cannot be recovered after it has passed into currency." No suspicion is cast upon the *bona fides* of the defendant. It received the money in the ordinary course of business, and for a good and valid consideration. The defendant had no connection with the fraud of Gill. He did not act or assume to act as the defendant's agent in the transaction with the plaintiff. The money was not obtained through or by means of his relation to the defendant. The position and rights of the parties are precisely the same as if Gill had not been a member of the board when the payment was made, or as if the debt which he paid had not originated in any violation of trust. It is said that the case is to be governed by the doctrine established in this State that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no ear-mark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefore to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world. "Money," said Lord MANSFIELD, in Miller v. Race, before cited, "shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business." The question involved in this case was considered by JOHNSON, J., in Justh v. Bank of Commonwealth (56 N. Y. 478), and he says: "In the absence of trust or agency, I take the rule to be that it is only to the extent of the interest remaining in the party committing the fraud that money can be followed as against an innocent party having a lawful title founded upon consideration; and that if it has been paid in the ordinary course of business, either upon a new consideration or for an existing debt, the right of the party to follow the money is gone." The case perhaps did not call for a decision upon the point whether an existing debt was a sufficient consideration to uphold a title to money fraudulently obtained by a debtor, and by him paid to his creditor, as against the defrauded party; but we think it correctly declares the rule of law upon the subject. The case of Caussidiere

v. Beers (2 Keyes 198) is entirely consistent with the rule here declared. The defendant in that case had no right to the money either against the agent from whom he obtained it or the principal to whom it belonged. The judgment should be reversed and a new trial ordered.

All concur. Judgment reversed.[1]

STATE NATIONAL BANK v. PAYNE.

56 Ill. App. 147.—1894.

Mr. Justice Pleasants.—This suit was commenced by appellee [Payne] before a justice of the peace and, on appeal to the circuit court, verdict and judgment were in his favor.

The evidence clearly tends to show that in April, 1893, W. B. Diggs, who then owed one Cooke $100, executed to appellee a chattel mortgage upon certain live stock and grain, including twenty-five acres of growing wheat, to secure a note to him for $800 due one day after date, with interest at six per cent. per annum. In the following fall, when it was being threshed, he turned it over to appellee, who was on the ground and arranged to pay the threshers, to apply on the mortgage debt. As his agent, and by his direction, Diggs sold it to the elevator company in Springfield, receiving therefor its two checks on the bank, payable to himself, for $154. When he presented them for payment, Mr. Jones, the father-in-law of Cooke, who claimed the $100 that the latter had loaned to Diggs, and who was an officer of the bank, demanded, after the checks were presented, that he should pay that debt out of the money for which they were drawn. Diggs then told him he could not do so, because that money belonged to appellee, but would pay it soon out of the proceeds of other sales, and left the bank. Within an hour he again appeared at the counter, where Jones told Pierik, who was then acting as paying teller, that Diggs agreed he (Jones) should have credit for $100, and to pay him (Diggs) the balance. Pierik asked Diggs if that was right, and receiving no reply, paid him $54 and some cents, which he took and went out. Some time thereafter appellee went to the bank and demanded this $100, which was refused, and thereupon he brought this suit to recover it.

The defense is that the bank is not liable because there was no privity between it and appellee. This action is for money had and

[1]Accord, Ball v. Shepard, 202 N. Y. 247 (1911); Alabama Bank v. Rivers, 116 Ala. 1 (1896); Merchants' Insurance Co. v. Abbott, 131 Mass. 397 (1881). See also, Bank of Charleston v. Bank of the State, 13 Rich. L. (S. Car.) 291 (1866).

But contra where the check is made payable to the innocent defendant upon the faith of a note purporting to be defendant's note, but in fact a forgery by defendant's debtor. Hathaway v. County of Delaware, 185 N. Y. 368 (1906).

See Brundred v. Rice, 49 Ohio 640 (1892), for an attempt to create and interpose a corporation as the guilty recipient, in order to protect the actual, guilty individual recipients.

received by appellant for use of appellee, which is of an equitable character and lies wherever the defendant has money which, *ex æquo et bono,* belongs to plaintiff. In this case, though the legal title to the money was in Diggs, if the bank, through its officer, Jones, who received it, had notice that it was impressed with a trust in the hands of the party from whom he received it, we understand that the *cestui que trust* may recover it in this action at law as well as in equity. Whether it be so because in such a case no proof of privity between the parties is required, as held in Drovers' National Bank v. O'Hara, 18 Ill. App. 182, or because the law always and conclusively implies it, as seems to be held in Havana Press Drill Co. v. Ashurst, 148 Ill., pp. 137 *et seq.* (140), the consequence is the same.

It is claimed that the case of Hall v. Capen, 27 Ill. 386 (and Capen v. Hall, 29 Ill. 512), is on all fours with the one at bar, and directly against the ruling in it. We see no analogy in fact or principle between them. There the defendants had no notice nor any ground for a suspicion that the money in question which he received belonged to the plaintiff, or was not the money of the party from whom he received it. The Supreme Court said it was his and not the plaintiff's. Here the defendant, when it received it, had full and distinct notice that it was the plaintiff's and not Diggs'. The difference could not be wider or more radical. We think the case of O'Hara, *supra,* affirmed in 119 Ill. 646, is decisive of this, and required the ruling of the court below on the instructions asked, which only is here assigned for error. Judgment affirmed.

HINDMARCH v. HOFFMAN.

127 PA. ST. 284.—1889.

STERRETT, J.—This case having been submitted for trial without a jury, according to the provisions of the act of April 22, 1874, P. L. 109, the learned president of the common pleas found the facts substantially as follows: On the morning of October 10, 1885, Richard Savanack stole from plaintiff, in Buffalo, N. Y., a large sum of money, $400 of which he afterwards, on same day, deposited with defendant, to be returned to him or upon his order. When defendant received the money he was ignorant of the fact that it had been stolen from plaintiff by Savanack; but, while it was still in his possession and under his control, he was notified of that fact by plaintiff's attorney, and that plaintiff claimed it as his property. Notwithstanding the notice he afterwards paid the money, "upon the order of Savanack, to Messrs. Brundage, Weaver & Bell, of Buffalo, receiving from them a bond to indemnify him against any liability to any other person for the money." Afterwards, upon defendant's refusal to pay the amount to plaintiff, this action of *assumpsit* was

brought to recover the same. It does not appear to have been even questioned, in the court below, that, upon the established facts, plaintiff had a good cause of action; but the learned judge was of opinion that he could not recover in the present form of action, and he accordingly entered judgment for defendant. His conclusions of law were duly excepted to, and they now constitute the specifications of error before us. As found by the learned judge, the money sued for as money had and received by defendant to the use of plaintiff never belonged to Savanack, nor could he have legally recovered any part of it. On the contrary, it was plaintiff's money, stolen from him by Savanack, and by the latter left with defendant. While it was thus in his custody and under his control, he was fully informed of the theft, and also that plaintiff, as owner of the money, claimed it. Under these circumstances, it was clearly his duty to hold it for plaintiff, and, upon satisfactory proof of ownership, to pay it over to him. From the existence of that duty the law raised an implied promise by defendant to do so; but, in disregard of his duty in the premises, he paid it over, on the order of the thief, to parties who had no right whatever to receive it. Justice demands that he should now be compelled to pay the amount to the rightful owner; and there is no good reason why it should not be recovered in the present form of action.

In Clark v. Shee, Cowp. 197, it was held that case, for money had and received, will lie by the true owner of money against a third person into whose hands it came *mala fide*, provided its identity can be traced or ascertained. Referring to the form of action in that case, Lord MANSFIELD characterized it as "a liberal action in the nature of a bill in equity, and, if under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action." In 2 Greenl. Ev. (13th ed.), §§ 102, 120, the principle is thus stated: "Where the defendant is proven to have in his hands the money of the plaintiff, which, *ex æquo et bono*, he ought to refund, the law conclusively presumes that he has promised so to do, and the jury are bound to find accordingly, and after verdict, the promise is presumed to have been actually proved." "So, if money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort and bring *assumpsit* upon the common counts." *Assumpsit* was also sustained in Mason v. Waite, 17 Mass. 558, upon the following facts: Bank-notes, done up in a package, were delivered by the owner to a carrier, who, without authority, paid them to a third party for a loss at a faro-table. In an opinion sustaining a judgment in favor of the owner of the notes against the party to whom they were thus paid, the chief justice, after remarking that trover would have been the better action but for the difficulty of identifying bank-notes, said: "We do not see, however, why the action for money had and received will not lie. The notes were paid and received as money, and as to any want of privity or any implied

promise the law seems to be that where one has received money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over." The defendant in the case at bar did not better his position by improperly handing over the money in question to those who had no right whatever to receive it, after he knew it had been stolen, and that plaintiff was its true owner. The undisputed facts connected with his possession of the money immediately before he parted with it are quite sufficient to raise such an implied promise as will support *assumpsit*. We are, therefore, of opinion that the court erred in not entering judgment in favor of plaintiff for the amount claimed, viz., $400, with interest from May 24, 1886, the time suit was commenced before the city recorder. Judgment reversed, and judgment is now entered in favor of the plaintiff and against the defendant for $400, with interest from May 24, 1886, and costs.[1]

---

iii. *Trespass to Goods.*

FANSON v. LINSLEY.

20 KAN. 235.—1878.

VALENTINE, J.—This action was commenced in a justice's court, and after judgment, was appealed to the district court. The plaintiff's bill of particulars reads as follows:

CLAY CENTER, CLAY CO., KAN., Sept. 18, 1876.

A. Fanson, Dr. To Chas. E. Linsley:

For work and labor performed, repairing and running a steam threshing machine, from Aug. 20, 1876, to Sept. 10, 1876, 18 days' work, at $2 per day	$36 00
Cr., cash	5 00
Balance due	$31 00

The defendant's amended bill of particulars, after the title, reads as follows:

I. The defendant for a first defense to the plaintiff's bill of particulars herein, says, that he denies each and every allegation therein contained.

[1] In Zink v. Wells Fargo & Co., 72 Ill. App. 605 (1897), a thief had transferred to Zink, stolen money, in consideration of services *to be performed.* Wells, Fargo & Co., from whom the money had been stolen, brought an action of assumpsit against Zink. The court said (p. 611): "A thief cannot by written order assign stolen money in consideration of services to be performed in the future and thereby give to the assignee a title that will prevail over that of the true owner."

II. The defendant further answering says, that the cause of action of the plaintiff herein arises upon a contract for the employment of the plaintiff by the defendant as an engineer of a steam threshing-machine owned by the defendant, and that after the machine had been run for the period of eleven days during the threshing season of 1876, by the plaintiff as its engineer, the defendant, discovering a defect in the machinery of said machine, determined to abandon its use, and in pursuance of such determination the defendant laid up and housed said machine; and that afterward, while said machine was laid up and housed, he (the plaintiff) took possession of said machine and ran the same for the period of three days, and that the use of said machine was worth the sum of fifteen dollars per day, amounting to the sum of forty-five dollars, for which the defendant asks judgment of the plaintiff.

III. The defendant further answering says, that the cause of action herein set forth by the plaintiff arises upon a contract for the employment by the defendant of the plaintiff as an engineer of a steam threshing-machine; that during the absence of the defendant, the plaintiff, without the knowledge or consent of the defendant, took possession of the said machine, and moved it a great distance from where it was left by the defendant, so that it cost the defendant the sum of $12 to get said machine back to the place from where it was taken by the plaintiff. The defendant further says that while the plaintiff was so in possession of said machine, said machine was damaged in the sum of fifteen dollars. The defendant asks judgment against the plaintiff for said sum of twenty-five dollars.

The defendant asks judgment against the plaintiff for the sum of seventy-two dollars. * * * Judgment was rendered in favor of the plaintiff and against the defendant. * * *

The cause of action set up in the defendant's second defense is really founded upon a tort. But it is also founded upon an implied contract, at the election of the defendant. That is, the defendant may waive the tort, if he chooses, and treat his cause of action as one arising upon an implied contract. The wrong committed by the plaintiff affected his estate. It benefited the estate of the plaintiff. And it was committed for the purpose of benefiting the estate of the plaintiff. And therefore it will be presumed or *implied* that the plaintiff agreed to pay for such benefit. We think it is well settled, that wherever one person commits a wrong or tort against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer. (Stewart v. Balderston, 10 Kan. 142; Tightmeyer v. Mongold, 20 Kan. 90, and cases there cited.) The party injured may in such case elect to sue upon the implied contract for the value of the benefits received by the wrongdoer, or he may sue upon the tort for the damages which he himself has sustained. According to the defendant's bill

of particulars in this case, the value of the use of said threshing-machine for the three days which the plaintiff used it, was $45. If this bill of particulars were true, the defendant should have recovered that amount; or rather, after setting off one claim against the other he should have recovered the balance due.

We do not think that the cause of action stated in defendant's third defense is a proper subject of either set-off or counterclaim. It does not appear from such defense that the plaintiff received or expected to receive any benefit from his wrongdoing; and the relief asked for by the defendant is not for the value of any benefit resulting to the plaintiff, but is for damages sustained by the defendant. The cause of action therefore does not arise from any contract express or implied (Tightmeyer v. Mongold, *supra*) and therefore it cannot be pleaded by the defendant as set-off. And said cause of action has no connection with the employment of said plaintiff by the defendant to operate, or in operating, said threshing-machine for the defendant, and hence it cannot be pleaded by the defendant as a counterclaim.

The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.[1]

[1] Accord, Janes v. Buzzard, Hemp. 240 (U. S. Superior Ct. for Ark. 1834), the court saying (p. 243): "It is no doubt true that Buzzard might have brought an action founded upon the tortious act of Janes, and recovered damages for the wrongful taking, as well as the illegal detention of his servants [slaves]. But it was competent for him, and he had the election to waive the tort and to bring an action *ex quasi contractu*. There is abundant authority to sustain this position. In the case of Stockett v. Watkins, 2 Gill & Johns. Rep. 320, it was held that where one gets possession of chattels tortiously, and converts them into money, the real owner may waive the tort and sue in assumpsit for the proceeds, and that action has been sustained in some instances where the trespasser has not parted with the chattels. Where they have been returned to the owner, he may still waive the tort, and then recover their value for the time of their detention in assumpsit. 1 Saund. Pl. & Ev. 133; 1 Chitty, Pl. 94; 1 Mo. Rep. 643." Contra, Crow v. Boyd's Adm'r, 17 Ala. 51, reported herein at ante, p. 578.

REYNOLDS ET AL. v. PADGETT.

94 GA. 347.—1894.

SIMMONS, J.—All the authorities agree that one who takes and sells personal property belonging to another without the consent of the owner is liable for its value in an action upon an implied promise to pay for the property. The authorities differ as to whether such an action will lie where the person taking the property does not sell it, but retains it for his own use; but the weight of authority seems to be that the action will lie where the person who takes the property enriches himself or makes a profit from the property, either by selling it, or by retaining it and using it himself, with the intention to convert it permanently. Pom. Code. Rem., §§ 567, 569, and notes. The defendant in this case did neither of these things. He found the wagon in the street, and hitched his horses to it, for the purpose of going upon a fishing excursion for one day; but, upon starting to go, the tongue of the wagon was broken by one of the horses, and he unhitched the horses, and left it in the street. It was finally carried to his lot, and left there, but there is no evidence that he ever made any claim to the wagon or any further use of it, nor was anything further proven tending to show that he intended to convert it permanently to his own use. On the contrary, the indications are that he was holding it for the use of the owner. We, therefore, think the trial judge was right in holding that an action upon an implied contract would not lie, but that the plaintiff must sue in tort for the damage to his property.

Judgment affirmed.

iv. *Trespass to Land.*

SMITH v. STEWART.

6 JOHNS. (N. Y.) 46.—1810.

ACTION for *use and occupation.*

Per Curiam.—At common law no action of *assumpsit* for rent would lie, except upon an express promise, made at the time of the demise. (Johnson v. May, 3 Lev. 150, Bull. N. P. 138.) The present action is given by the statute of 11 Geo. II, c. 19, sec. 14, which we have adopted. (Laws, Vol. I, 146.) But this statute, from the terms of it, seem to apply only to the case of a *demise,* and where there exists the relation of *landlord* and *tenant,* founded on some *agreement* creating that relation. So are the precedents. (2 H. Black. 319.) Here the defendant did not enter under such a relation, but under a contract for a deed. He, therefore, entered under a color of title which might have been enforced in equity. He finally refused to perform the contract, and changed himself into a trespasser; and the better opinion is, notwithstanding the case of Hearn and Tomlin (Peake's N. P. 192), that he never was strictly a tenant, and never entitled to notice to quit, nor liable to distress, or to an action of *assumpsit* for rent. He is liable in another way, to be turned out as a trespasser, and is responsible, in that character, for the mesne profits. The motion to set aside the nonsuit is, therefore, denied. Judgment of nonsuit.[1]

[1] Seemingly in accord are Preston v. Hawley, 139 N. Y. 296 (1893), and Lamb v. Lamb, 146 N. Y. 317 (1895). In Bunke v. N. Y. Telephone Co., 110 N. Y. App. Div. 241 (1905) plaintiff was allowed in a tort action for trespass to land to recover as damages the value of the use and occupation to the trespasser. Affirmed without opinion, 188 N. Y. 600 (1907); discussed in 6 Col. L. Rev. 351.

As to assumpsit for use and occupation, see also, Carpenter v. U. S., 17 Wall. (U. S.) 489 (1873), reported herein ante, p. 405.

The historical reasons which explain the refusal to allow *indebitatus assumpsit* for rent are given by Professor Ames in an article on "Assumpsit for Use and Occupation," 2 Harvard Law Review, 377-380. These reasons are stated as follows: "It is instructive to compare a lease for years, reserving a rent, with a sale of goods. In both cases, debt was originally the exclusive action for the recovery of the amount due. In neither case was the duty to pay conceived of as arising from a contract in the modern sense of the term. Debt for goods sold was a grant. Debt for rent was a reser-

ACKERMAN v. LYMAN.

20 Wis. 454—1866.

Action for the value of the use and occupation of premises alleged to have been the property of one Holdridge, and afterwards of the plaintiff, and to have been occupied by the defendant "according to the permission" of said Holdridge and subsequently of the plaintiff, from October 1, 1859, to February 1, 1863. The plaintiff had taken an assignment of Holdridge's claim for that portion of the time during which the latter owned the premises. The answer, among other things, denies that the defendant occupied the premises "according to the plaintiff's permission," and alleges that he went into possession December 20, 1860, as assignee of an unpaid mortgage on the land, and held and occupied under the mortgage until February, 1863, when plaintiff paid him the amount due on the mortgage, and he delivered up the possession to the plaintiff. A verdict and judgment were rendered for the plaintiff; and the defendant appealed.

Downer, J.—The appellant claims that the circuit court erred in instructing the jury, that if they found that the defendant went into possession of the premises, knowing that they belonged to Holdridge, and setting up no right to them in himself, or in any other person under whom he claimed, adverse to the rights of Holdridge, and remained in possession thereof with the assent of Holdridge or his duly authorized agent, and without setting up any claim adverse to the right of Holdridge to the premises, then the law would imply a promise on the part of the defendant to pay to Holdridge or his assigns, whatever the use and occupation was reasonably worth for the time he so held.

It is maintained that there is no evidence to warrant the instruc-

vation. About the middle of the sixteenth century, assumpsit was allowed upon an express promise to pay a precedent debt for goods sold; and in 1602 it was decided by Slade's case that the buyer's words of agreement, which had before operated only as a grant, imported also a promise, so that the seller might, without more, sue in Debt or Assumpsit, at his option. Neither of these steps was taken by the courts in the case of rent. . . . The chief motive for making Assumpsit concurrent with Debt for goods sold was the desire to evade the defendant's wager of law. This motive was wanting in the case of rent, for in debt for rent wager of law was not permitted. Again, although Assumpsit was the only remedy against the executor of a buyer or borrower, the executor of a lessee was chargeable in debt. These two facts seem amply to explain the refusal of the courts to allow an *Indebitatus Assumpsit* for rent." By the statute 11 Geo. II, c. 19, sec. 14, "*Indebitatus Assumpsit* became concurrent with debt upon all parol demises. . . . But *Indebitatus Assumpsit* for rent being of statutory origin, the courts could not, without too palpable a usurpation, extend the count to cases not within the act of Parliament. The statute was plainly confined to cases where, by mutual agreement, the occupier of land was to pay either a defined or a reasonable compensation to the owner. Hence the impossibility of charging a trespasser in assumpsit for use and occupation."

tion, and that if there was, it is erroneous. It is not very clear from the evidence whether the defendant entered as a trespasser without color of title, or under Johnson, a tenant of Holdridge, and continued in possession by his permission. We are inclined to the opinion that there was evidence from which the jury might have found that Holdridge permitted the defendant to occupy the premises, and that he remained in possession under that permission until the mortgage was assigned to him. But the instruction is to the effect that if he entered as a trespasser without claim of title, and remained in possession with the assent of Holdridge, the law will imply a promise to pay rent. If this be so, then all that is necessary to convert a trespasser into a tenant is, for the owner of the premises to say to him, "I assent to your possession," and the trespasser becomes a tenant without his own consent, or even against his will. A tort cannot thus be converted into a contract. At common law, no action of *assumpsit* for rent would lie, except upon an express promise made at the time of the demise. Johnson v. May, 3 Lev. 150; Smith v. Stewart, 6 Johns. 46. The action for use and occupation in this state rests on section 17, ch. 91, R. S., which is in substance the same as sec. 14, ch. 19, 11 Geo. II. That section required that there should be an agreement; but it is well settled that the agreement may be express or implied. It may be implied from the defendant's entering into possession by the permission of the plaintiff, or from acts showing the assent of the defendant, after a tortious entry, to hold under the permission of the plaintiff. Henwood v. Cheesman, 3 Serg. & Rawle, 500; Ryan v. Marsh, 2 Nott & McCord, 156; Stockett v. Watkins' Adm'rs, 2 Gill & Johns. 326; Wiggin v. Wiggin, 6 N. H. 298.

In Henwood v. Cheesman, the court below charged that if the defendant occupied the land by the consent and permission of the plaintiff, the jury might presume a promise to pay a reasonable rent; and this instruction was held correct. But it is evident from the whole case (the testimony in which is not fully reported), that the defendant either entered into possession by permission of the plaintiff, or it was a conceded fact that after he was in possession he held under his permission; for the court, in its opinion, say that "if the defendant came on as a trespasser, the plaintiff cannot recover in an action for use and occupation." And to the same effect are Stockett v. Watkins' Adm'rs, and Ryan v Marsh, and other authorities there cited.

In this case, the plaintiff alleges in his complaint that Holdridge permitted the defendant to have, hold and occupy the premises, and *"that the defendant, according to that permission, held and occupied,"* etc. The defendant, in his answer, denies the permission of Holdridge, and denies that he, according to the permission, held, occupied and enjoyed the premises. It appears to us the instruction ignored a material part of the issue, to-wit: that formed by the denial of the defendant that he held possession according to the

permission of the plaintiff, and was therefore erroneous. A trespasser cannot be converted into a tenant without his consent. * * *

By the Court. The judgment of the Circuit Court is reversed, and a *venire de novo* awarded.[1]

NATIONAL OIL REFINING CO. v. BUSH.

88 PA. ST. 335.—1879.

ASSUMPSIT by the National Oil Refining Company against Bush, for the use and occupation of certain premises. The plaintiffs in the court below declared in assumpsit, filing two counts for use and occupation of certain premises; the first count being in *indebitatus assumpsit* and the second on a *quantum valebat.* The defense was that the form of the action should have been trespass, and not assumpsit; that, after a notice to quit, a landlord cannot sue for use and occupation of premises held over; and that the notices of October, 1874, and January, 1875, forever severed Bush's relation of tenant to the company. The contention of the company, on the other hand, was that, if a landlord permits the tenant to hold over after the time fixed by the notice to quit, in order that he may negotiate with him for a new letting, and does so negotiate with him, the original contract relation subsists, and the tenant is liable thereon.

MR. JUSTICE GORDON.—Undoubtedly the court below was right in submitting to the consideration of the jury the question whether Bush was occupying the premises in controversy at the sufferance of the Refining Company or as a trespasser merely. If, indeed, as was said in the case between these same parties, reported in 5 W. N. C. 143, the defendant was permittted to remain in the possession of the property, and he did so remain until the plaintiff elected by its writ of ejectment, or otherwise, to regard him as a trespasser, up to that time, it might recover from him the worth of the premises, by the action of assumpsit for use and occupation; but from the time the company made its election to treat him as a trespasser, it could no longer recover from him on the ground of an implied contract; for, the landlord, having thus determined the status of the occupant, there is no room left to presume a contract. It is true, indeed, that in the first place, the tenant cannot shelter himself under such a plea, for it is not for him, but the landlord, to say in what light he shall be regarded, whether as tenant or trespasser; whether the tort shall be waived or not; but

[1] Accord, Dixon v. Ahern, 19 Nev. 422 (1887), with a review of American cases. For a citation of American authorities see also "Action for Use and Occupation against a Trespasser," by Eugene McQuillin, in 23 Central Law Journal, 387.

when the landlord has once determined this question, the matter is settled, and he must abide by his own decision. It is upon this ground that the case of Goddard v. Hall, 55 Maine, 579, is put. It was there held, that an action for use and occupation could not be maintained against a disseisor, and that a judgment upon a writ of entry negatived the relation of landlord and tenant. Of like force is the case of Featherstonhaugh v. Bradshaw, 1 Wend. 134, which rules that assumpsit will not lie after proceedings to obtain possession under the statute against a tenant holding over, it appearing by the plaintiff's affidavit, that the holding over was without his assent or permission, hence, his assent could not be implied in the face of his oath to the contrary. And it is therein taken as indisputable, per SUTHERLAND, J., that the action of assumpsit will not lie to recover rent accruing subsequently to the demise laid in a declaration in ejectment. These cases illustrate what we have already said, that the action depends upon the landlord's assent, express or implied, to the tenant's use of the premises, and his election to treat the occupant as a disseisor negatives such assent.

When, therefore, the Refining Company, through its agent, following up its two previous notices, informs Bush, on the 8th day of January, his holding over having then already commenced, that he was but a trespasser, and that he would be held for damages accordingly, there was something to show that the company did not assent to his occupancy of the premises, and that it had determined to treat him as a disseisor. Hence, we repeat there was something to submit to the jury; something from which the jury might have found a verdict for the defendant.

Nevertheless, whilst this is so—whilst we agree that the question, as to whether Bush was or was not a trespasser, was one calling for the consideration of a jury, yet we can not but think that the court was wrong in this, that it charged, *inter alia,* "But in this case you find a notice to quit of October 16, 1874, and that is followed up by two letters, addressing him, and regarding him as a trespasser; and there is no evidence that after that the plaintiffs assented to his remaining." It does not follow that, notwithstanding the three several notices and the threat to treat him as a trespasser, the company did not, after all, permit him to remain on the premises pending the negotiations for a new lease. That he did hold over, and that the plaintiff did not institute adversary process, immediately after the last notice, are some evidence that he was there holding at sufferance. Then the fact that negotiations for a new lease were pending between the parties, especially if taken in connection with the letter of Mr. Schick, the attorney of Bush, is well nigh conclusive of the fact that he remained in possession of the property by permission, and not as a disseisor.

Besides it was error to set the jury upon a hunt after a new contract of lease; such contract was not necessary to the maintenance of the action; it is not necessarily founded upon a specific contract,

written or oral, but upon the use of the premises. The occupant may be in fact a trespasser, but the owner of the tenement may waive the trespass and recover in assumpsit, and it does not lie with the tortfeasor to defeat him by interposing his own wrong. To tell the jury, therefore, that they must find some new contract between the parties, in order to rebut the presumption arising from the notices, was error, for that presumption might well be rebutted by the subsequent acts of those parties.

The judgment is reversed, and a *venire facias de novo* ordered.

PHELPS v. CHURCH OF OUR LADY HELP OF CHRISTIANS.

99 Fed. 683 (40 C. C. A. 72).—1900.

Before Acheson, Dallas, and Gray, Circuit Judges.

Acheson, Circuit Judge.—* * * * In this action of assumpsit, the receiver of the Metropolitan Marble Company seeks to recover the value of certain stone which, as he alleges and claims to have shown, was wrongfully mined from and taken out of the said quarry during his company's ownership thereof, as lessee, by one John J. Sullivan, who was acting for the defendant, and was a naked trespasser as against the Metropolitan Marble Company; which stone was brought by the defendant to East Orange, in the state of New Jersey, and was there actually appropriated by the defendant, and used in building its church.

Now, if the true state of facts be as above alleged, it seems to us, under the authorities, that the plaintiff can maintain a personal action in this jurisdiction against the defendant to recover the value of this stone. Hoy v. Smith, 49 Barb. 360; Hughes v. United Pipe Lines, 119 N. Y. 423, 23 N. E. 1042; Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 55 N. J. Law 350, 357, 26 Atl. 920. And we think that the plaintiff could waive the tort, and sue in assumpsit, especially in view of the fact that the defendant had not only actually applied the stone to its own beneficial use, but had so used the stone that it cannot be reclaimed. Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216; Dundas v. Muhlenberg's Ex'rs, 35 Pa. St. 351, 353; Halleck v. Mixer, 16 Cal. 574, 578; 2 Greenl. Ev., § 108.

The rulings of the court below did not directly contravene any of the legal principles we have discussed; but upon the conclusion of the plaintiff's case, and without any evidence having been offered by the defendant, the learned judge instructed the jury to find a verdict in favor of the defendant, on the ground that the case involved a question of title to the land from which the stone was taken, which question could not be determined in this action. Was the court justified in thus taking the case from the jury?

Now, the Court of Errors and Appeals of New Jersey, in Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., *supra,* after stating that the owner of land can generally maintain trover against a per-

son who severs and converts to his own use what is part of the realty, such as ores, etc., added this qualification:

"But there is a considerable line of cases holding that if the defendant, at the time of the severance, is in adverse possession of the realty, under a *bona fide* claim of title, the thing severed becomes his property, so that the owner of the land cannot maintain trover or replevin therefor, but must resort to his remedy for the possession of the land and mesne profits."

The earliest case in this line is Mather v. Ministers, 3 Serg. & R. 509, in which the Supreme Court of Pennsylvania ruled that trover for stone and gravel dug from land does not lie, by one who has the right of possession, against the person who has the actual adverse possession of the land and sets up title to it. From the later decision by the same court, in Harlan v. Harlan, 15 Pa. St. 507, 513, 514, it appears that the possession, to defeat such personal action, is not the occupancy of a mere intruder, but actual adverse possession, maintained under a *bona fide* claim of title. In Halleck v. Mixer, 16 Cal. 574, the rule is thus stated:

"The plaintiff, out of possession, cannot sue for property severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, and under claim and color of title. In other words, the personal action cannot be made the means of litigation determining the title to real property, as between conflicting claimants;[1] but the rule does not exclude the proof of title on the part of the plaintiff in other cases; for it is, as we have already observed, upon such proof that the right to recover rests. It is because the plaintiff owns the premises, or has a right to their possession, that he is entitled to the chattel which is severed; and that must, of course, in the first instance, be established. A mere intruder or trespasser is in no position to raise the question of title with the owner, so as to defeat the action."

Here it appears from the certified exemplification of the record in evidence, that James A. Phelps, as receiver of the Metropolitan Marble Company, instituted before the county judge of Lewis County, N. Y., a summary proceeding against John J. Sullivan and his associates, charging them with unlawful and forcible entry into, and unlawful and forcible detainer of, the aforesaid tract of land, which proceeding, on December 21, 1897, resulted in a judgment dispossessing Sullivan, and restoring possession to Phelps, the receiver of said company. Accordingly, and before this suit was begun, possession of the land was restored to this plaintiff who was in possession when he brought this action, and has retained possession. Moreover, upon an attentive examination of the record in this case, we fail to discover any evidence of title in the defendant

[1] Accord, Downs v. Finnegan, 58 Minn. 112 (1894), the court saying: "The settled principle is that title to land cannot be tried *ex directo* in transitory actions."

or in Sullivan to the *locus in quo*. Sullivan appears in the light of a mere trespasser, who had been in the temporary unlawful occupancy of the premises. The case, as presented by this record, is not one of conflicting titles to the land. It will be observed that, at the time the court gave peremptory instructions against the plaintiff, the defendant had not put in any evidence whatever. * * *

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with direction to grant a new trial.[1]

---

v. *False Imprisonment.*

THOMPSON v. BRONK ET AL.

126 MICH. 455.—1901.

MONTGOMERY, C. J.—The defendant, Bronk, had a contract with the warden of the state prison at Jackson, by the terms of which the warden was to furnish to defendant the labor of 300 convicts, to be employed in manufacturing shirts, at a stated price per day. The defendant, Buffington, is a partner of Bronk, and stands in the same relation to plaintiff. Under the contract, the selection of men was left with the warden, and the contractor was bound to accept such able-bodied men as were supplied him. The plaintiff was committed to this prison by the circuit court for the county of Newaygo, and was detained under a commitment claimed to be void on its face. The plaintiff was by the warden assigned to work on defendant's contract. He continued on this contract for the period of 576 days. Defendants paid the state for plaintiff's labor at the agreed price. Under a rule of the prison, plaintiff was permitted to receive pay from the defendants for overtime, and for doing good work, amounting, in the aggregate, to $58.49. The plaintiff, on obtaining his discharge from the custody of the warden, brought this action against defendants to recover for the value of the services rendered. The declaration contains the labor and *quantum meruit* counts. The circuit judge, after finding the above facts, entered judgment for defendants, and plaintiff brings error.

If the law raises an implication of a promise to pay plaintiff for these services, it cannot be an implication of fact, but a fiction. It is clear that defendants had no thought of accepting services from plaintiff, to be compensated in any other way than under their express contract with the warden. It is said, in some cases, where the defendant is guilty of a wrong, that the law will recognize an implied,

[1] See also, O'Conley v. President and Selectmen of Natchez, 1 S. & M. (Miss.) 31 (1843), where assumpsit was allowed to the plaintiff to recover wharfage received by the city authorities, who trespassed upon the plaintiff's wharf and landing, and collected tolls and charges belonging to him.

or, more accurately speaking, a constructive, contract, and enforce it. Hertzog v. Hertzog, 29 Pa. 465. But, where the circumstances repel all implication of a promise in fact, the law will not imply a promise, unless something has been done on which an implication of a promise can be rested, as in the case of a sale of personal property by a tortfeasor, who then became liable to an action for money had and received. Watson v. Stever, 25 Mich. 386. These defendants contracted with a third party for laborers. Under such contract, the third party furnished certain laborers,—among them, the plaintiff. The defendants paid to the third party the contract price for the labor so supplied. No contract relations existed between the parties to this suit. There was no privity between them. They were not consenting bargainors, coming together in contract relations manifested by some intelligible conduct, act, or sign, and the whole transaction was brought about and is accounted for by circumstances repelling every possible implication of contract relations. Two cases are cited in support of plaintiff's contention, which at first reading might appear to give support to his claim, but we think these cases may be distinguished. In Patterson v. Crawford, 12 Ind. 241, a recovery was had, by a convict improperly imprisoned, against the contractor with the prison authorities, for services rendered while unlawfully in prison. In that case the contract was for the services of *all* convicts, at a gross sum. This, of course, meant all convicts lawfully confined. The services of plaintiff were not, therefore, contracted for or paid for by defendant under his contract with the state. The defendant therefore had the benefit of the plaintiff's services. In the present case the defendant paid for all services rendered, and this distinguishes the case. We express no opinion as to whether the case of Patterson v. Crawford was rightly decided. The other case is Greer v. Critz, 53 Ark. 247, 13 S. W. 764. In that case the county court undertook to enter into a contract with defendant for plaintiff's services while he worked out a fine imposed by the court. The county judge had no power to make such a contract, and defendant, being a party to the contract, was held bound to know of this lack of authority, and that, as he had the benefit of plaintiff's services, he was obliged to pay for them. In the present case the defendants were not responsible for the plaintiff's status as a convict. They accepted his services under a perfectly valid contract with the warden. They have paid for such services, and we think the law will imply no promise to pay for them again. Judgment affirmed. The other justices concurred.[1]

[1] Accord, Sloss Iron Co. v. Harvey, 116 Ala. 656 (1897), the court saying: "The appellee (plaintiff below) was a county convict hired, under our convict system, to the appellant (defendant below) to perform hard labor. The statute provides that such convicts shall not be required to work on Sunday, Christmas Day, Fourth of July, or on Thanksgiving Day. Acts 1894–95, p. 858, § 40. . . . The defendant, having the plaintiff in its custody as a convict, for the purpose of subjecting him to hard labor, *required* him to do this work on the prohibited days. The plaintiff submitted to this require-

vi. *Interference with Status or Contract.*

LIGHTLY v. CLOUSTON.

1 TAUNT. 112.—1808.

THIS was an action of *indebitatus assumpsit* "for work and labor performed for the defendant at his request, by one Thomas Sinclair, the apprentice of the plaintiff legally bound to him by indenture, for a term of years at the time of the work and labor so performed existing and unexpired, and to the profits and receipts of whose work and labor the plaintiff was, as the master of the said apprentice, by law entitled." The defendant seduced the apprentice from on board the plaintiff's ship in Jamaica, and employed him as a mariner to assist in navigating his own ship from Port Royal home. The cause was tried at the sittings after Trinity term last before MANSFIELD, Ch. J. The jury found a verdict for the plaintiff, subject to the opinion of the court on the following objection, namely, that the plaintiff ought to have declared in a special action on the case, and that *indebitatus assumpsit* would not lie.

MANSFIELD, C. J.—It is difficult upon principle to distinguish this case from those that have arisen on bankruptcies and executions, and in which it has been held that trover may be converted into an action for money had and received, to recover the sum produced by the sale of the goods. I should much doubt the case of Smith & Hodson (4 T. R. 217), but that I remember a case so long back as the time of Lord Chief Justice EYRE in the reign of George the Second, in which the same thing was held. I should have thought it better for the law to have kept its course, but it has now been long settled, that in cases of sale, if the plaintiff chooses to sue for the produce of that sale he may do it; and the practice is

ment under the restraint and coercion of imprisonment and the command of his keeper. It was involuntary. There can be no doubt, we think, that the circumstances repelled all inference or implication of a promise to pay for the services. The acts of the defendant in compelling the performance of the labor were tortious. They were trespasses, committed by direct force. The imprisonment at the place and for the purposes of the unlawful exactions of labor was, for the time being, unauthorized by law. Quiet submission to the exactions made them none the less trespasses. Cooley, Torts, 169, 170. These being the conditions, an action ex contractu, of course, will not lie."

Contra, see Patterson v. Prior, 18 Ind. 440, reported herein at p. 586; and see also, Abbott v. Town of Fremont, 34 N. H. 432 (1857), where it is held that "if overseers of the poor retain in their charge, as a pauper, an insane person, not needing relief, for the sake of a profit to be made for the town out of his labor, and they let out his labor for a year to one who pays the town an agreed sum beyond providing for the insane person's support, such insane person may waive his remedy against the overseers for the personal injury, and recover the money of the town in an action for money had and received."

beneficial to the defendant, because a jury may give in damages for the tort a much greater sum than the value of the goods. In the present case the defendant wrongfully acquires the labor of the apprentice; and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort, and may say that he is entitled to the labor of his apprentice, that he is consequently entitled to an equivalent for that labor, which has been bestowed in the service of the defendant. It is not competent for the defendant to answer that he obtained that labor, not by contract with the master, but by wrong; and that therefore he will not pay for it. This case approaches as nearly as possible to the case where goods are sold, and the money has found its way into the pocket of the defendant.

HEATH, J.—So long back as the time of Charles the Second it was held that the title to an office, under an adverse possession, might be tried in an action for the fees of the office had and received; and HOLT, Ch. J., held it clear law that if a person goes and receives my rents from my tenants, I may bring my action against him for money had and received. It is for the benefit of the defendant that this form of action should be allowed to prevail, for it admits of a set-off, and deductions, which could not be allowed in an action framed on the tort.

Rule discharged.[1]

---

vii. *Usurpation of Office.*

ROSALIE KREITZ, ADMX., v. BEHRENSMEYER.

149 ILL. 496.—1894.

PHILLIPS, J.—At the election in November, A. D. 1886, John B. Kreitz and one Behrensmeyer were candidates for election to the office of county treasurer of Adams county, Ill., and, on the canvass of the returns, Kreitz was declared elected by a plurality of fourteen votes; and, a certificate being made, a commission was issued to him by the governor, as the duly-elected county treasurer of Adams county, whereupon he qualified, and entered upon the discharge of the duties of that office,—continuing to occupy the office, and discharge its duties, until his death, in 1890. Appellee, by proper notice and petition, contested the election of Kreitz, which, after extended litigation, finally resulted in appellee being declared duly elected to the office of county treasurer of Adams county, by the judgment of this court, reported as Behrensmeyer v. Kreitz,

[1] Accord, Hopf v. U. S. Baking Co., 6 Misc. 158 (N. Y. Supreme Ct.) (1892), where it was held that a father, by suing for his minor son's wages, had waived the tort of the defendant in harboring the son against his father's wish.

135 Ill. 591, 26 N. E. 704. Kreitz having died before the filing of this opinion, such proceedings were had in this court that the judgment of reversal was entered *nunc pro tunc* as of the 11th day of June, A. D. 1890, which declared Behrensmeyer elected to said office. On the 6th of April, 1892, appellee filed a claim against the estate of John B. Kreitz in the county court of Adams county, seeking to recover the sum of $10,000 for fees and salary received by Kreitz for Behrensmeyer's use, and interest thereon. On the petition of appellant, the venue on this claim so filed was changed from the county court to the circuit court of Adams county, where a trial was had which resulted in a finding and judgment in favor of appellee, and against appellant, for the sum of $7,333, to be paid in due course of administration, as a claim of the seventh class. Appellant prosecuted an appeal from that judgment to the appellate court of the third district, where the judgment was affirmed; and she now brings the record to this court by appeal, and urges that appellee has no cause of action, and asks that this case may be considered as one of first impression, regardless of what was said by this court in Mayfield v. Moore, 53 Ill. 428,—arguing that that case was decided under the constitution of 1848, and that by the provisions of the constitution of 1870 a different rule must prevail, inasmuch as, by the provisions of the latter, the fees of the office belong to the county, from which a salary is paid for the discharge of the duties of the office, while under the former the fees belonged to the officer.

It is conceded that no statute exists in this state declaring the rights of a *de jure* officer to recover from a *de facto* officer the salary paid such *de facto* officer, who has discharged the duties of the office under a wrongful or a mistaken purpose. There is no legislation on that subject in this state. The right of recovery, if it exists, depends, therefore, on the principles of the common law. The common law is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country. Judicial decisions of common-law courts are the most authoritative evidence of what constitutes the common law. By chapter 28, Starr & C. St. Ill., the common law of England is declared in force in this state. By reference to the decisions of the common-law courts of England, the common law of that country is to be found. An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a *de jure* officer has a right of action to recover against an officer *de facto* by reason of the intrusion of the latter into the office, and his receipt of the emoluments thereof. Among others, the following opinions of English courts may be referred to as sustaining this right of recovery: Vaux v. Jefferson, 2 Dyer 114; Arris v. Stukely, 2 Mod. 260; Lee v. Drake, 2 Salk. 468; Webb's

Case, 8 Coke 45. By the adoption of the common law of England the principle announced in these cases was adopted as the law of this state, for the principle is of a general nature, and applicable to our condition. On the basis of a sound public policy, the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, if no benefit but a loss would result from wrongful retention or usurpation of an office. The question has frequently been before the courts of the different states and of the United States, and the great weight of authority sustains the doctrine of the common law, as shown by the opinions of the judges in different states; and which in most of the states are based on the common law, without reference to any statute. The following cases are in point: U. S. v. Addison, 6 Wall. 291; Dolan v. Mayor, 68 N. Y. 274; Glascock v. Lyons, 20 Ind. 1; Douglass v. State, 31 Ind. 429; Currey v. Wright, 9 Lea 247; Kessel v. Zeiser, 102 N. Y. 114, 6 N. E. 574; Nichols v. MacLean, 101 N. Y. 526, 5 N. E. 347; People v. Miller, 24 Mich. 458; Hunter v. Chandler, 45 Mo. 452; People v. Smith, 28 Cal. 21; Petit v. Rousseau, 15 La. Ann. 239. And the only case enunciating a different rule is that of Stuhr v. Curran, 44 N. J. Law 181, where the conclusion was reached by a divided court.[1]

While it is true that in this state a public office is not a franchise nor an incorporeal hereditament, but a mere public agency created for the benefit of the state, yet the salary or emoluments annexed to a public office are incident to the right to the office, and not to the mere exercise of its duties, or its occupancy; and whether the compensation of the officer is by fees, or a salary, the rule is the same. People v. Smith, *supra;* McVeany v. Mayor, 80 N. Y. 185; Comstock v. Grand Rapids, 40 Mich. 397.

Such being the rule, the constitution of 1870 did not change the law, in this respect, from what it was under the constitution of 1848. [*Here follows a discussion of the sections of the constitution of 1870.*] The provisions of those sections creating no different rights, so far as a *de jure* officer is concerned, the rule announced by this court in Mayfield v. Moore, 53 Ill. 431, is as applicable under the present constitution as under the constitution of 1848, and in harmony with the rule of the common law of England, as well as with the great weight of authority in this country, and has been followed by this court in more recent adjudications. Farwell v. Adams, 112 Ill. 58; Waterman v. Railroad Co., 139 Ill. 669, 29 N. E. 689. We adhere to the rule as announced in Mayfield v. Moore.

[1] In Stuhr v. Curran (1882), the question is exhaustively discussed and the authorities reviewed in the prevailing opinion by VAN SYCKEL, J. (pp. 183–192), and in the dissenting opinion by Beasley, C. J. (pp. 192–206). This decision of the New Jersey Court of Errors and Appeals was by a vote of 7 to 5.

It is further insisted that appellee cannot recover because he was never fully qualified, not being commissioned by the governor, and not filing bonds, as collector, for the years 1888-89-90. As was said in Mayfield v. Moore, *supra:* "Under the law, so soon as a majority of the votes were cast for appellant at the election held in pursuance to law, he became legally and fully entitled to the office. The title was as complete then as it ever was, and no subsequent act lent the least force to the right to the place. The commission was evidence of title, but not the title. The title was conferred by the people; and the evidence of the right, by the law." The contested election was continued through a long period of litigation, and, by the final adjudication of a court of competent jurisdiction, the appellee's right to the office was determined in his favor. That determination was after the term expired for which he had been elected. His right to recover does not depend upon his possession of a commission. The judgment of the court determined his right. Neither is his right to recover affected by the fact that he failed to give bond as collector for the years 1888, 1889, 1890, and failed to qualify. The statute requiring the oath of office and bond to be given by or within a specified time applies only to a person to whom the certificate of election has been given, or who has been declared elected. Where an election has been contested, and the contestant is declared elected, the requirement to qualify within a prescribed time does not apply until the termination of the contest. Farwell v. Adams, *supra.* The law will not require a useless act, and by taking the oath of office, and filing bonds, as collector, for the several years of 1888-89-90, no purpose could have been subserved, as the contest was not determined until after the full term had expired. Appellee's right of recovery is therefore not affected by these considerations. * * * *

We do not desire to enter on a discussion of the question as to whether it is a hardship on Kreitz, or his estate, that he should be held to receive no compensation for his services; for, however great that hardship may be, the rule of law has been long settled in this state that the *de jure* officer may recover the fees or salary paid to a *de facto* officer. The rule is in accord with a sound public policy. Its tendency is that there would be less danger or frequency of usurpation or intrusion into an office. Its tendency is to cause greater caution in, and purify, elections, as one, with such danger attendant on illegal voting, would abstain from encouraging it. Its tendency is to cause a careful investigation into the right to an office, where a notice of contest is served and petition filed. Public interest is in accord with private right, when it is held that one lawfully elected to an office, and deprived of the office by another, may recover the salary or fees attendant on the office. The rule is not changed by reason of one holding a certificate of election, and entering in good faith, under a mistaken belief of right. However much the good faith of one entering, the right exists somewhere; and, if the right existed in another, he is an intruder in the office,

and enters at his peril. As was said in Mayfield v. Moore, *supra:* "After the vote was canvassed by the clerk and justice of the peace, appellant promptly gave appellee notice that he would contest the election, and specifically pointed out the grounds. Being thus apprized of the grounds upon which appellant based his claim, the sources of information were open to him to learn the facts, and to have acted upon them. Failing to learn them, or, having done so, not heeding them, he has no reason to complain if he has to respond to the wrong perpetrated on another. He has intruded into appellant's office without right, and has received the profits of the office; and, like the person entering into the land of another with a defective title, he must answer for the profits." We find no error, and the judgment of the appellate court is affirmed. Affirmed.[1]

D. Relation of Quasi-Contract to Equity.

Lord Sumner in SINCLAIR v. BROUGHAM.[2]

[1914] A. C. 398, 454-456.

Historically, the action for money had and received was not devised by the Court of Chancery, nor was it applied there either in form or in substance. It was a form of assumpsit, already old in Lord Mansfield's time, and his own citation of earlier actions of this sort should be enough to show, if that were necessary, that he never thought otherwise. It was said to be a "liberal" action in that it was attended by a minimum of formality, and was elastic and readily capable of being adapted to new circumstances. The action has been described as "liberal" because "the party waives all torts, trespasses, and damages." Anon., 1772, Lofft, 320. In and after Lord Mansfield's time its liberality in point of practice is shown by the fact that the plaintiff declared with a minimum of particulars and the defendant pleaded the general issue, under which he could prove almost anything. (See 2 Williams' Saunders, 120, Notes to Chandler v. Vilett; Orton v. Butler, 1822, 5 B. & Ald. 652; Owen v. Challis, 1848, 17 L. J. C. P. 266. No doubt it gave scope (at least in days when reported cases were less multi-

[1] Accord, Booker v. Donohue, 95 Va. 359 (1897). Where the intruder acted in good faith, and in apparent right, there should be deducted from the amount of fees and emoluments sought to be recovered from him, his reasonable expense incurred in earning them. Mayfield v. Moore, 53 Ill. 428 (1870); Albright v. Sandoval, 216 U. S. 331 (1910). (Contra, Douglass v. State, 31 Ind. 429 (1869).) But there should be no deduction for the personal services of the intruder, nor for the profitable use of the de jure officer's time while he was deprived of the office. People v. Miller, 24 Mich. 458 (1872).

[2] A statement of the facts in this case and a part of Lord Chancellor Haldane's opinion are reported herein ante p. 88.

tudinous than now) for decisions to meet what is called the "justice of the case." These features attracted Lord Mansfield, chafing already at the rigidity of the older forms of action, and emulous no doubt of the adaptability and growth which characterized the doctrines of equity in his time. He, and Buller, J., spoke of the action in somewhat varying terms from time to time. See Weston v. Downes, 1778, 1 Doug. 23; Longchamp v. Kenny, 1779, 1 Doug. 137; Sadler v. Evans, 1766, 4 Burr. 1984; Straton v. Rastall, 1788, 2 T. R. 366. Lord Mansfield, who in Clarke v. Shee, 1774, Cowp. 197, merely described the action as "a liberal action in the nature of a bill in equity," in Towers v. Barrett, 1786, 1 T. R. 133, says it is "founded on principles of eternal justice." In Straton v. Rastall, 1788, 2. T. R. 366, Buller, J., says that "Of late years this court has very properly extended the action for money had and received; it is founded on principles of justice, and I do not wish to restrain it in any respect. But it must be remembered that it was extended on the principle of its being considered like a bill of equity. And, therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and that he could recover it in a court of equity." But the reported cases do not show how, if at all, this obligation was enforced. I think it is evident that Lord Mansfield did not conceive himself to be deciding that this action was one in which the courts of common law administered "an equity" in the sense in which it was understood in the court of chancery. See observations of Farwell, L.J., in Baylis v. Bishop of London [1913], 1 Ch. 127, and the cases actually decided show that the description of the action as being founded in the aequum et bonum is very far from being precise. Even the decision in Moses v. Macferlan, 2 Burr. 1005, which has since been dissented from, for some time unsettled the law, see Smith's Leading Cases, Notes to Marriot v. Hampton, 1797, 7 T. R. 269; 2 Sm. L. C. (11th ed.) 421, and this last-mentioned case is one which illustrates the proposition that money is not thus recoverable in all cases where it is unconscientious for the defendant to retain it, for no one could doubt that Hampton's retention of the money in that case was very like sharp practice. Crockford v. Winter, 1807, 1 Camp. 124, and Martin v. Morgan, 1819, 1 Brod. & B. 289, are instances, on the other hand, which show that Lord Ellenborough and Dallas, C. J., respectively understood that in that form of action the court strove to do what was just and not to administer equity. With whatever complacency the Court of King's Bench might regard the views expressed in Moses v. Macferlan, 2 Burr. 1005, protests were very early made against it in the Common Pleas, Johnson v. Johnson, 1802, 3 Bos. & P., 162, at p. 169, and in Miller v. Atlee, 1849, 3 Exch. 799; 13 Jur. 431, Pollock, C. B., bluntly declared the notion that the action for money had and received was an equitable action to be "exploded," and Parke, B., sitting by him, did not say him nay. This episode is reported only in 13 Jurist, but it smacks of truth. Since, then, allusions have been

made from time to time to the connection between this cause of action and equity or the aequum et bonum (thought they are not precisely the same things), for example in Smith v. Jones, 1842, 1 Dowl. P. C. (N. S.) 526; Tregoning v. Attenborough, 1830, 7 Bing. 97; Rogers v. Ingham, 1876, 3 Ch. D. 351; Phillips v. London School Board [1898], 2 Q. B. 447, at p. 453; and Lodge v. National Union Investment Company [1907], 1 Ch. 300, at p. 312, but I take them all to be merely descriptive of the undoubtedly wide scope of this essentially common law action.

CASE v. ROBERTS.

HOLT (N. P.) 500.—1817.

THIS was an action for money had and received. The plaintiff had paid fifty pounds into the hands of the defendant, for the purpose of concluding an action for a breach of promise of marriage, brought by a relation of the plaintiff. The plaintiff's counsel proved the payment of the money for this specific purpose, and then put in a letter of the defendant's, written to the plaintiff, in which he gave an account that he had expended the money in a journey to Bristol, for the purposes of the cause. The plaintiff's counsel then contended that the defendant ought not to have gone to Bristol; that it was not necessary for the action; and that he was not authorized to go there. He likewise falsified in some particulars the defendant's account.

Best, serjeant, and *Gaselee,* for the defendant, insisted that the present action could not be maintained. If money is advanced, and the purpose for which it is advanced fails, an action lies to recover it back, but this was in substance a trust; an action of account might lie, or the plaintiff might go into a court of equity, but money had and received could not be maintained. The defendant has furnished an account, and discharged himself by it; if he has been guilty of a breach of trust the plaintiff must have recourse to another tribunal.

BURROUGH, J.—If money is paid into the hands of a trustee for a specific purpose it cannot be recovered in an action for money had and received until that specific purpose is shown to be at an end. The action for money had and received must not be turned into a bill in equity for the purpose of discovery. If the plaintiff show that the specific purpose has been satisfied, that it has absorbed a certain sum only, and left a balance, such balance (the trust being closed) becomes a clear and liquidated sum for which an action will lie at law. Whilst the matter remains in account, and is charged with the specific trust, the action for money had and received will not lie.

The cause was afterward settled.

ADAIR v. WINCHESTER ET AL.

7 G. & J. (Md.) 114—1835.

Appeal from chancery. The appellees claiming under a deed of trust to them from Murray & Payson, partners in trade, bearing the date of the 30th of December, 1826, exhibited their bill against the appellant, and his partner, John Adair (since deceased) and Murray & Payson, claiming on account of, and payment of the proceeds of sundry promissory notes, which it was alleged, had been deposited with the Adairs, by the agent of Murray & Payson, to secure the payment of $1,500, loaned by the former to the latter.

The bill alleged that Murray & Payson, trading under the firm of A. B. Murray & Co., being pressed for money in June, 1826, delivered to one Reyburn, as their agent, four promissory notes, amounting in the whole to $3,229.04 to get discounted for their use. That failing to get them discounted, the agent with the approbation of Murray & Co., placed them by the way of pledge, with the Adairs, to secure the payment of $1,500, which they agreed to and did loan upon them. That subsequently in July of the same year the firm of Murray & Co. being found to be insolvent, the partnership was dissolved, and the defendants formally notified, by an agent specially sent for that purpose, that the notes in question were their property, and the surrender of the same demanded upon a tender of the entire principal and interest of the amount advanced upon them; and that the surrender so demanded was refused. That since then the notes have all been paid. Prayer for an account of the proceeds of the notes; that the balance found due may be decreed to be paid to the complainants, and for general relief.

The answer of the defendants admitted the deposit of the notes with them by Reyburn, the advance of $1,500 upon them, and their subsequent payment, but they denied all knowledge of Murray & Co. in the transaction, insisting that they dealt with Reyburn as the owner of the notes, and gave him a receipt for the same as security for the principal and interest of the sum loaned. They declare their willingness to account to Reyburn, to whom alone they are responsible, and to him only upon the production of their receipt; and in conclusion they state, that the complainants, if injured, should seek redress in a court of common law, and not in a court of chancery, which has no jurisdiction over the subject of their complaint.

Bland, Chancellor, decreed an account, and the auditor having stated one accordingly, the same was subsequently ratified, and the amount ordered to be paid to the complainants. From this decree the defendants appealed to the court of appeals.

Dorsey, J.—The first question for our consideration is: Had the chancery court jurisdiction over such a case as is presented by the bill of complaint? View the case as you will, and it is, in effect,

nothing more than an action for money had and received. That by proceeding in a court of law ample and perfect redress for the wrong complained of could have been obtained, has not been, and cannot be denied. How, then, can the appellee sustain the right of the chancellor to adjudicate in such a case, consistently with the well settled general principle found in all the books on the subject, and announced as text law in Mitf. Pl. 123, that the courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice.

Is there anything in the facts of this case, either as charged in the bill, or disclosed in the proof, which removes it from the operation of the general rule? The mere fact of the complainant's standing in the character of an assignee will not sustain the jurisdiction. Although in a court of chancery the assignor is looked upon as the trustee of the assignee, the *cestui que trust*, equity does not lend its aid to enforce the rights of the assignee of a chose in action, unless its interposition becomes necessary, by reason of the inability of a court of common law, to do him adequate justice; notwithstanding, in the language of 1 Mad. Ch. Pr. 545, the assignment, "Is considered in the nature of a declaration of trust," and in 546, that courts of equity "will protect the assignment of a chose in action as much as courts of law will that of a chose in possession." The same author on page 547 states, "that an assignee of a chose in action, as he is entitled to all the remedies of the seller, so he takes it subject to the same equity, as it was liable to in the assignor's hands." He must pursue his remedies in the same tribunals in which the assignor, had no assignment been made, was bound to seek them. When obstacles growing out of the assignment are so interposed as to hinder, or render extremely difficult, the successful prosecution of his remedies at law, then will a court of equity, upon the appropriate application, step forward and extend to him that equitable protection which his exigencies demand. But this protective interposition is never afforded, until rendered necessary by the occasion. Is there any thing in the allegations of the bill, or the testimony adduced in their support in respect to the situation or conduct of the assignor which renders a resort to a court of equity indispensable to prevent a failure of justice? Does it appear that the appellees, whilst seeking redress in a court of law, would have encountered a shadow of difficulty, to which the assignor himself would not have been subjected? Nothing of the kind is discoverable. Is it charged in the bill, or does the proof warrant the inference that facts essential to the establishment of the plaintiffs claim rest exclusively within the knowledge of the defendants, and that their disclosure can only be extorted by a bill of discovery? The proceedings furnish no such intimation. Can their claim be classed under any of the heads wherein courts of law and equity have a general concurrent jurisdiction? Certainly not. If then the jurisdiction of the chancery court in the case at bar can be sustained at all, it must be by reason of its exclusive jurisdiction in most matters

of trust and confidence. But this is not such a trust as falls under the exclusive control of a court of equity. It is a *quasi* trust of which courts of law take judicial cognizance, are competent to administer justice adequate and complete, and over which a court of chancery, under ordinary circumstances had no jurisdiction. This doctrine, when connected with the rule before recited, from Mitford on Pleading, is substantially asserted in Cooper Eq. Pl. 27, where in treating of the jurisdiction of a court of equity it is said, "it therefore exercises an exclusive jurisdiction in most matters of trust and confidence, but not in all, for various species of trusts, as deposits, and all manner of bailments, and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received, to another's use, which is the ground of an action on the case, are cognizable at law. But in cases of trusts, or second uses (as they have been sometimes called) the exclusive jurisdiction of the courts of equity is fully established." Our views upon the subject are supported, too, by 3 Black. Com. 432, where that learned commentator, after speaking of those subjects, over which courts of law and equity have concurrent jurisdiction, and of those in which a court of chancery has the exclusive jurisdiction (amongst which latter enumeration he includes what he calls a technical trust), remarks, "but there are other trusts which are cognizable in a court of law, as deposits, and all manner of bailments, and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case, almost as universally remedial as a bill in equity." A similar doctrine has been sanctioned by an enlightened tribunal in a sister state. Ashley's Adm'rs and Heirs v. Denton, 1 Littell 86. Where the court, after stating uses and trusts to be, "a favored part of the jurisdiction of the chancellor," further observes, "but notwithstanding this acknowledged authority, it cannot be extended to every case, where one party has trusted another, or, in other words, placed a confidence which has been abused. If so, every case of bailment, and every instance of placing chattels by loan or hire would be swallowed up by courts of equity. Nay, every case where credit was given for debt or duty would soon be drawn into the same vortex. It ought, then, to be confined to cases of controlling rights, vested and remaining in trustees, created as such in some proper mode, and not be extended to all cases of abused confidence."

In matters of trust, of the kind now before the court, we hold that there is no ordinarily concurrent jurisdiction in courts of law and courts of equity; and we feel no disposition to carry the powers of a court of chancery further than they have been already legitimately extended; when by so doing, we give to the plaintiff, at his pleasure to deprive the defendant of the privilege of the trial by jury. If authorities are necessary to show that the mere fact of the assignment confers no jurisdiction, they may be found in Carter v. Unit. Ins. Co., 1 Johns. Ch. R. 463; Lenox et al. v. Roberts, 2 Wheat. 373.

Believing, as we do, that the chancery court has transcended its authority in assuming the jurisdiction it has exercised in this case, and that its decree must therefore be reversed, we forbear to express any opinion upon the other questions which in the arguments of the counsel were submitted to our consideration.

Decree reversed, and bill dismissed without costs or prejudice.

ROBERTS v. ELY ET AL, EX'RS.

113 N. Y. 128.—1889.

THE complaint in this action alleged, in substance, that one Geiger, and plaintiff, composing the firm of Geiger & Co., purchased, in April, 1871, of David J. Ely, defendants' testator, a quantity of teas, then in the custody of the Chicago & China Tea Company; that it was agreed between the purchasers and that company that it should hold the teas in store and insure the same for their benefit, which it did, together with other teas belonging to Ely; that the teas so insured were destroyed by fire and the insurance money for the whole collected and received by Ely in November, 1872, who wrongfully appropriated the whole thereof and paid no portion to Geiger or defendant, and refused to pay over or account for the same; that Geiger assigned all his interest in the claim to plaintiff. The relief demanded was that the defendants account for and pay over to plaintiff all moneys received by reason of the destruction of the teas belonging to Geiger & Co.

ANDREWS, J.—* * * * The case falls within the familiar doctrine that money in the hands of one person to which another is equitably entitled, may be recovered in a common-law action by the equitable owner, upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled. The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity. Whenever one person has in his possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure without prejudice to the interest of third persons.[1] No privity of contract between the parties is required, except that which results from the circumstances. (Mason v. Waite, 17 Mass. 560.) The right on the one side, and the correlative duty on the other, create the necessary privity and

[1] See, for example, Ramsdell v. Butler, 60 Maine 216 (1872).

justify the implication of a promise by the defendant to do that which justice and equity require. It is immaterial, also, whether the original possession of the money by the defendant was rightful or wrongful. It is sufficient that the duty exists on his part, created by the circumstances, to account for and pay it over to the plaintiff.

Nor is this form of action excluded because, in a general sense, there is a relation of trust between the parties arising out of the transaction. There are many cases of trust cognizable only in a court of equity. The cases of express trusts of property are generally of this kind. The duty of the trustee to the *cestui que trust*, to perform the trust and to account according to its terms and conditions, is as a general rule enforcible only in an equitable action. The necessity of taking an account, the frequent complexity of details, the separate and varied interests often affected, and the necessity of moulding the relief to suit the circumstances, render the procedure of courts of equity peculiarly suitable in the administration of formal trusts, and in many cases indispensable to the ascertainment and enforcement of the rights and obligations of the parties. But the fact that money in the hands of one person is impressed with a trust in favor of another, or that the relation between them has a trust character, does not, *ipso facto*, exclude the jurisdiction of courts of law. The general rule that trusts are cognizable in equity and are enforceable only in an equitable action, is subject to many exceptions, "as, for instance, cases of bailments, and that larger class of cases where the action for money had and received for another's use is maintained *ex aequo et bono*." (Story's Eq. Jur. sec. 60; Comstock, J., Lawrence v. Fox, 20 N. Y. 278.)

The present case falls within the exception. Upon the plaintiff's theory of the facts, Geiger & Co. were the equitable owners of a *pro rata* part of the insurance money received by Ely. That firm and Ely were alone interested in the question, as it is conceded that Ely was entitled to all the money received, subject only to the claim of Geiger & Co. The only accounting required was such as was necessary to ascertain the extent of the interest of Geiger & Co., and that depended upon simple facts as readily ascertainable in a legal as in an equitable action. The case, therefore, presented a cause of action upon a liability implied by law, and it was subject to the limitation of six years prescribed by section 91 of the Code of Procedure, in force when the cause of action arose. The money was paid to Ely in 1871, and the facts were known to Geiger & Co. at or soon after that date. The action was commenced in 1881. Assuming that an equitable action could be brought to enforce the liability claimed, it would still be subject to the limitation of six years. (Matter of Neilley, 95 N. Y. 390.) The plaintiff cannot avoid the application of the statute by treating the actual appropriation of the money by Ely in 1874 as the cause of action. The right of Geiger & Co. to recover was perfect from

the time of its actual receipt by Ely in 1871. (Lillie v. Hoyt, 5 Hill 395.)

The judgment should be affirmed.[1]

All concur.

MINCHIN v. MINCHIN.

157 MASS. 265.—1892.

CONTRACT, for money had and received. Verdict for the plaintiff.

FIELD, C. J.—* * * * The written paper was under seal and was signed by the plaintiff, and it purports to convey the money sued for, absolutely to John Minchin, who was the defendant, and the executrix of whose will defends the suit, he having died. The conveyance contains full covenants like those contained in a warranty deed of land, and is "in consideration of five dollars (and love and affection) to me paid by John Minchin," etc. The evidence admitted against the defendant's objection consisted of oral evidence tending to prove that the money was delivered to John Minchin, and showing the circumstances under which it was delivered and the paper signed, and of conversations with John Minchin, or of statements made by him afterwards, to the effect that the money was held by him as the property of the plaintiff and for his benefit.

Under the rulings and instructions of the presiding justice the principal question is whether, in an action at law to recover the money, it is competent to show by oral evidence that the money was conveyed to John Minchin in trust, to keep it and to pay it over to the plaintiff on demand. The action is, in substance, an action for money had and received to the plaintiff's use. It is settled that an express trust in personal property may be created orally, and may be proved by oral testimony. Sturtevant v. Jaques, 14 Allen, 523; Childs v. Jordan, 106 Mass. 321; Thacher v. Churchill, 118 Mass. 108; Davis v. Coburn, 128 Mass. 377; Chace v. Chapin, 130 Mass. 128; Chase v. Perley, 148 Mass. 289.

We do not deem it necessary to consider the cases which hold that a formal conveyance like this in an action at law cannot be shown by oral testimony to have been intended as a mortgage or as collateral security, or as anything else than an absolute conveyance, on the ground that such evidence contradicts the writing. Some of these cases are cited in Reeve v. Dennett, 137 Mass. 315.

[1] See also the discussion in Chapman v. Forbes, 123 N. Y. 532 (1890), where it was held that although the action at law for money had and received is equitable in its nature, yet it is not within the contemplation of the Code of Civil Procedure, § 452, embodying the equity rule as to bringing in other parties when it is necessary for a complete determination of the controversy.

In general they are actions which concern the legal title. In equity it has been held that an absolute deed of land may be shown to be a mortgage by oral testimony, Campbell v. Dearborn, 109 Mass. 130, and in equity an absolute conveyance of personal property may be shown by oral testimony to have been made in trust for the grantor or for other persons. Davis v. Coburn, and other cases cited. See Hess' appeal, 112 Penn. St. 168; Calder v. Moran, 49 Mich. 14; Edinger v. Heiser, 62 Mich. 598; Mohn v. Mohn, 112 Ind. 285; Thomas v. Merry, 113 Ind. 83; Barry v. Lambert, 98 N. Y. 300; Danser v. Warwick, 6 Stew. 133; Twomey v. Crowley, 137 Mass. 184; 1 Perry on Trusts, sec. 86; Pom. Eq. Jur. sec. 1008. Such a trust usually can be enforced only in equity, but when the trust is to pay over money to the plaintiff on demand, and nothing else remains to be done, an action at law can be maintained. Chase v. Perley, *ubi supra.* Such an action is of an equitable character, and it proceeds on the ground that the legal title is in the defendant, but that in equity and good conscience he should hand over the property to the plaintiff. We see no reason why in such an action brought to enforce such a trust the rules of equity regarding the admission of evidence should not prevail. In the view of equity the evidence does not contradict the writing, but tends to establish an equitable title consistent with the legal title which was conveyed to the defendant by the writing and by the delivery. In a grant of land with full covenants, but in trust for the grantor, whether the trust is declared in the deed of grant, or in a writing signed by the grantee, the trust is not regarded as inconsistent with the grant or with the covenants, and when the statute of frauds does not require the trust to be created or proved by a written instrument, the oral declaration of such a trust is not in equity regarded as inconsistent with a similar grant of personal property. If any of the evidence admitted related to conversations had before the writing was signed, the objection to its admission does not appear to have been taken on that ground, and, so far as has been pointed out, the conversations may be considered as showing only the circumstances under which the written conveyance was signed.

Exceptions overruled.[1]

[1] But see Boyce v. Wilson, *ante*, p. 361.

INDEX